No. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
July Term, 1996

JACK G. SWISHER, *Petitioner*

v.

THE STATE BAR OF TEXAS, *Respondent*

On Petition For A Writ Of Certiorari To

The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

Jack G. Swisher
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161, fax 713/978-6342

Pro se for Petitioner

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QUESTIONS PRESENTED

1. Whether or not the Rules under which petitioner was suspended from his practice of law, 1.01(b)(1) and 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., both inherently and as applied to petitioner, have an illegal disparate impact on disabled Texas attorneys under the Americans with Disabilities Act, of which class petitioner is a member, and thereby violated petitioner's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

2. Whether or not the Rules under which petitioner was suspended from his practice of law herein, 1.01(b)(1) and 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., inherently and as applied to petitioner, imposed cruel and unusual punishments and excessive fines and penalties, thereby violating petitioner's rights under the 8th Amendment to the Constitution of the United States.

3. Whether or not the Rules under which petitioner was suspended from his practice of law herein, 1.01(b)(1) and 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., are inherently, and as applied to petitioner, so vague, indefinite, overbroad and uncertain as to violate the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

4. Whether or not the ruling against petitioner was in error in that it was based upon a vague and indefinite general charge, or trap within it, unrelated to specific dates, places, events, persona, materials, etc., unmentioned in the *specific* charges against petitioner, in violation of petitioner's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

5. Whether or not the ruling against petitioner was in error in that it was based upon a preponderance of the evidence, under the provisions of Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendix A-1, Rules Of Disciplinary Procedure, Part II, The District Grievance Committees, rather than upon clear and convincing proof, that petitioner violated either Rule 1.01(b)(1) or Rule 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., thereby denying petitioner's substantive and procedural due process and equal protection rights under the provisions of the 14th

Amendment to the Constitution of the United States.

6. Whether or not the ruling was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein petitioner was denied the subjective awareness test applied to other defendants in Texas courts in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and in V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rules 5.01 and 5.03, thereby violating petitioner's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

7. Whether or not in violation of petitioner's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against petitioner was in error in that it was based upon appellee's argued positions that,

   a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eighth Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

   b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints on appeal."

8. Whether or not in violation of petitioner's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against petitioner was in error in that it was based upon appellee's two argued positions that,

   a. "The Americans with Disabilities Act ("ADA") is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101*. None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112.* The State Bar of Texas does not fit in the definition of a "covered entity."'

9. Whether or not the ruling against petitioner was in error in that it was based upon an increase of State Bar attorney fee charges from $920 to $2,770 against petitioner, and an increase of petitioner's active suspension period from 3 to 5 months, in wrongful retaliation against him for asserting his right in federal court to appear at the Evidentiary Panel hearing by phone rather than in person, because of his physical disabilities under the Americans with Disabilities Act, thereby violating petitioner's rights under the Americans with Disabilities Act, under 42 U.S.C. § 1983, the federal Civil Rights Act, and under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

10. Whether or not the ruling against petitioner was in error in that it was based upon the premise that the disciplinary suspension proceedings are civil in nature, rather than quasi-criminal, thereby violating petitioner's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

11. Whether or not the ruling against petitioner was in error in that petitioner was denied the opportunity to appear before the Texas Supreme Court by video teleconferencing to participate in the proceedings, as both an attorney and as a party, and to preserve the visual evidence that he is a disabled American cognizable under the Americans with Disabilities Act, thereby violating petitioner's rights under the Americans with Disabilities Act and his due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

12. Whether or not the rule of disciplinary procedure denying petitioner's stay of suspension pending appeal is federally unconstitutional, inherently and in its application against petitioner, as it denies disabled Texas attorneys their substantive and procedural rights to equal protection and due process under the 14th amendment to the United States Constitution.

LIST OF PARTIES

Respondent

The State Bar of Texas, as an agency of the State of Texas.

Petitioner

Jack G. Swisher

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OPINIONS BELOW

The only written opinion in the case is that by the State Bar Evidentiary Panel on September 29, 1994 in its ruling suspending petitioner from the practice of law for one year, the last seven months probated (Appendix A, p. 1). The State Bar's Board of Disciplinary Appeals ("BODA") on August 3, 1995 affirmed the Evidentiary Panel ruling (Appendix B, p. 9). By May 2, 1996 notice letter from the Clerk of the Texas Supreme Court, the Court affirmed the BODA ruling (Appendix C, p. 10). Petitioner's first amended motion for rehearing (Appendix D, p. 11) was denied by the Court on May 2, 1996 (Appendix, E, p. 32). Petitioner's second amended motion for rehearing (Appendix F, p. 33) was returned without consideration via Clerk, May 2, 1996 (Appendix G, p. 65), stating no provision in the Texas Rules of Appellate Procedure authorized 'a second motion for rehearing'.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 and Rule 10.1(c), Rules of the U. S. Supreme Court. Date of entry of the judgment by the Texas Supreme Court sought to be reviewed was April 12, 1996.

Rule 10 of the Revised Rules of the U. S. Supreme Court provides in part that a Petition for a Writ of Certiorari may be granted when a state court has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

Petitioner raises federal considerations in this appeal, ones involving the 8th and 14th Amendments, and the Americans with Disabilities Act ("ADA"), not yet decided and with conflicts between Texas and federal laws.

For example, in its briefs to BODA and the Texas Supreme Court respondent argued, without authority, and despite petitioner's cited contravening authority (infra):

a. "The ADA is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against indi-

viduals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101.* None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112.* The State Bar of Texas does not fit in the definition of a "covered entity."'

In the same briefs respondent met petitioner's 8th Amendment claimed violations as follows, despite petitioner's cited, more recent contravening authority:*

"Finally, the Eighth Amendment of the U.S. Constitution regarding cruel and unusual punishment does not apply in civil cases. *Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Zwick v. Freeman, 373 F2d 110, 119 (1967); Calzarano v. Liebowitz, 550 F. Supp. 1389, 1390 (N.Y. 1982).*"

*"The United States...suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). We disagree." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993)

STATEMENT OF THE CASE

(1) Court Proceedings annd Disposition in Courts Below:

The honorable Texas Supreme Court entered its decision April 12, 1996, affirming BODA's ruling, suspending petitioner from the practice of law for one year, with the last seven months probated, adding a $2,770 legal fee charge against petitioner, and removing the stay of his suspension pending appeal to the U.S. Supreme Court.

The case originated as a proceeding by respondent Texas State Bar Grievance Committee against petitioner for allegedly violating Rules 1.01(b)(1) and 1.03(a), Texas Disciplinary Rules of Professional Conduct, V.T.S.C.A., effective January 1, 1990. Following Committee recommendations, the Evidentiary Panel ruled that petitioner:

1. neglected a legal matter entrusted to him as Fisk's* lawyer [violating Rule 1.01(b)(1)], and
2. failed to keep Fisk reasonably informed about the status of a matter and promptly comply with his reasonable requests for information [violating Rule 1.03(a)].

The ruling was based upon specific Panel charges that:

a. (Petitioner) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

b. (Petitioner's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

c. (Petitioner) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

[*Petitioner's law firm represented Mr. Fisk in the referenced medical malpractice case.]

Petitioner had been unable to truthfully admit to failure under counts 'a', 'b', and 'c', because he had had no knowledge of the events upon which they were premised [SF2-23&24].

On rehearing by the Panel, petitioner appeared by telephone and testified. The resultant hearing record conclusively showed that he had had no knowledge of the events upon which counts 'a', 'b', and 'c' were based [SF2-23&24]. However, the Panel ruled against him as before, except that it increased his active suspension period from three to five months, and the legal fee charge from $920 to $2,770.

Petitioner appealed to BODA, BODA reinstating his stay of suspension pending the appeal. BODA affirmed the Panel ruling, and removed the stay pending appeal to the Texas Supreme Court.

The Texas Supreme Court reinstated petitioner's stay of suspension during his appeal to it. The Court affirmed the BODA

ruling, and removed the stay pending petitioner's petition for writ of certiorari to the U. S. Supreme Court.

The points of error were first presented by petitioner on appeal to BODA, preserved on appeal therefrom to the Texas Supreme Court, and were the same as those presented in this petition for writ of certiorari - except that disciplinary Rules 5.01 and 5.03* were first mentioned in petitioner's second amended motion for rehearing presented to the Texas Supreme Court (*5.01 and 5.03 scienter requirements had been raised with the other points of error.) Petitioner is unsure as to whether or not this honorable Court has before it respondent's full broom [Rule set 1.01(b)(1), 1.03(a), 5.01 and 5.03] to test its 14th Amendment sweep for vagueness and overbreadth, or just the handle [Rule set 1.01(b)(1) and 1.03(a)] to test for procedural due process abuse. No opinion has been written by any tribunal on petitioner's points of error.

(2) Statement of Facts:

As charged, petitioner failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

His failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

He failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

However, unknown to petitioner, the documents from the Texas district court noticing petitioner to file a status report, and thereafter of dismissal of his client, Mr. Fisk's medical malpractice case, had been lost in petitioner's offices by either attorney or non-attorney staff [SF2-31]. Other attorneys had handled the case [SF2-23]. Petitioner had no knowledge of the lost documents until the proceedings originated against him by respondent [SF2-24].

Respondent's offer of public reprimand would have been accepted and disposed of these proceedings but for two things:

1. Petitioner was required under the reprimand to untruthfully swear that he had actual awareness of the charged incidents

under Rule set 1.01(b)(1) and 1.03(a) (Appendix S, p. 130), and

2. A then recent Texas Supreme Court decision required such awareness to establish petitioner's 'conscious indifference' under Rule 1.03(c), a necessary subset to Rule 1.03(a) [*Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. - Jun, 1994)].

From the second Panel hearing respondent made only one fact finding which at first blush might be construed as supporting petitioner's *knowing* violation of Rules 1.01(b)(1) and 1.03(a), as follows (Appendix A, p. 1):

3) Although Respondent was contacted by Fisk subsequent to the December 27, 1991 dismissal, Respondent failed to inform Fisk of the dismissal. Instead, Fisk discovered that his case had been dismissed on January 20, 1993 when he contacted the 127th Judicial District Court directly to ascertain the status of his case.

That finding was based upon a statement in the record by Mr. Fisk referencing *calling by phone to*, as opposed to *speaking by phone with*, petitioner [SF2-13]:

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23   Q   You called who?
24   A   Jack Swisher.
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Mr. Fisk cleared up the meaning of his statement, before and after making it, as follows [SF2-14&15]:

```
20 A Well, I had called in October of 1992
       and I
21    didn't like what the receptionist had
      told
22   me over the phone.
23 Q You called who?
24 A Jack Swisher.
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 1 A And I just wanted to know that I had a
       case
 2   going, and I didn't like what the
 3  receptionist had to say so I kept trying
       to
 4   get in touch with Jack Swisher.
 8   January the 20th of 1993, I called the
 9    court myself and they told me the case
       had
10   been dismissed for lack of prosecution
11   December the 27th, 1991.
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19 Q After you learned from the court that the
20 case had been dismissed, did you try to
21 call Jack Swisher?

15

1 A I called immediately.
4 Q And were you able to speak with Mr. Swisher?
6 A No, ma'am. They still wouldn't let me
7 speak with Mr. Swisher.

As to *speaking by phone with* petitioner, Mr. Fisk further clarified his statement as follows [SF2-11&12]:

19 A From 1987, 1988, when I employed him, until
20 1993. I tried to contact him.
21 Q And how many times total do you think?
22 A About 12 times.
23 Q Were you ever able to speak with Mr.
24 Swisher during any of those times?
25 A No, I have never gotten a chance to talk

12

1 with Jack Swisher.
17 Q So, no oral or written communications?
18 A No, ma'am.

See also deposition exhibit confirming Fisk appearance at deposition with attorney Lyons on May 16, 1990, not with petitioner (Appendix T, p. 135).

ARGUMENT

Petitioner invokes the Supremacy Clause of the U. S. Constitution.

"We recognize that - the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.- *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975). But under the Supremacy Clause, from which our pre-emption doctrine is derived, - any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.- *Felder v. Casey*, 487 U. S., at 138 (quoting *Free v. Bland*, 369 U. S. 663, 666 (1962)); see also *De Canas v. Bica*, 424 U. S. 351, 357 (1976) (- even state regulation designed to protect vital state interests must give way to paramount federal legislation-)."

Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. _____ (1992).

Petitioner's right to earn legal fees is a property interest protected under the U. S. Constitution.

"Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). It is well settled that an interest attains the status of "property" by virtue of the fact that it has been initially recognized and protected by federal or state rules of law. It is also well established that a mutually recognizable entitlement will receive constitutional protection. *Brown v. Ledbetter*, 569 F.Supp. 170, 172 (N.D.Ga.1983) (citations omitted)." *Bodiford v. State Of Alabama, et al.*, 854 F.Supp. 886, 1994.

Petitioner's right to enjoyment of his good name and reputation are liberty interests protected under the U. S. Constitution.

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). See also *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (same with respect to "any charge ... that might seriously damage [a person's] standing and associations in his community"); *Paul v. Davis*, 424 U.S. 693, 722-723, 96 S.Ct. 1155, 1170-1171 (1976) (BRENNAN, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' ").

Also, because he is a severely disabled American, cognizable under the ADA, petitioner's right to earn legal fees is inextricably intertwined with his ADA and liberty interests protected under the 14th Amendment. His suspension by respondent constitutes a severe impairment of those interests warranting scrutiny as in *Albright v. Oliver*, 114 S.Ct. 1340, 127 L.Ed.2d 114, 62 USLW 4078, 1994.

"As a qualitative matter, we have decided that the liberty secured by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint. Although its contours have never been defined precisely, that liberty surely includes the right to make basic decisions about the future; to participate in community

affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place. (FN6) On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. Cf. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). At the same time, however, we have recognized that a variety of state actions have such serious effects on protected liberty interests that they may not be undertaken arbitrarily, (FN7) or without observing procedural safeguards. (FN8)" Justice STEVENS, with whom Justice BLACKMUN joins, dissenting. *Albright v. Oliver*, Id.

In each of his Propositions below, petitioner submits that Rules 1.01(b)(1) and 1.03(a), inherently and as applied, violated his federal rights, or the Panel, BODA, and the Texas Supreme Court abused their discretion in applying suspension sanctions against him in that their rulings were based upon erroneous views of the law or clearly erroneous assessments of the evidence. Because consequent deprivations of his rights are implicated under the 8th and 14th Amendments, and the ADA, petitioner submits those rulings are reviewable under the abuse-of-discretion standard.

"The United States Supreme Court has held that a court's imposition of sanctions under its inherent powers is reviewable under the abuse-of-discretion standard. *Chambers v. NASCO, Inc.*, --- U.S. ----, ----, 111 S.Ct. 2123, 2138, 115 L.Ed.2d 27 (1991). A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly *341 erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In the specific context of a disqualification motion, this circuit reviews fact findings for "clear error" while "carefully examining" the district court's application of relevant ethical standards. *In re American Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir.1992), cert. denied --- U.S. ----, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993)." *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

PROPOSITION I

THE RULES UNDER WHICH PETITIONER WAS SUSPENDED FROM HIS PRACTICE OF LAW, 1.01(b)(1) AND 1.03(a), TEXAS RULES OF DISCIPLINARY PROCEDURE, TEXAS GOVERNMENT CODE, V.T.S.C.A., BOTH INHERENTLY AND AS APPLIED TO PETITIONER, HAVE AN ILLEGAL DISPARATE IMPACT ON DISABLED TEXAS ATTORNEYS UNDER THE

AMERICANS WITH DISABILITIES ACT, OF WHICH CLASS PETITIONER IS A MEMBER, AND THEREBY VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The punishment provisions of the Disciplinary Rules, i.e., suspension from law practice, forcing severely disabled attorneys to obtain a livelihood by other means during the suspension, fall unequally and more harshly upon disabled attorneys than upon non-disabled attorneys. There is simply much greater difficulty for severely disabled vs. non-disabled attorneys to obtain a livelihood by other means than law practice during a period of suspension. The ADA was passed largely to overcome employment difficulties for disabled Americans such as petitioner.

Suspension from practice, active and probationary, constitutes part of respondent's program governing the practice of law in Texas. Disabled attorneys, under the ADA, have a 14th Amendment right to share equally in that program, and not be exposed to more severe punishments under it because of their physical disabilities.

A hearing was required to consider the facts of petitioner's disability, the disparate impact of the facially fair suspension recommendation by the American Bar Association imposed upon him by respondent, (infra) and an accommodation to fairly satisfy the reasonable interests of both respondent and the disabled American respondent.

In construing the federal Rehabilitation Act of 1973, which has language similar to that of the ADA, the U. S. Supreme Court established such requirements:

"In another unanimous decision, *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that some sorts of restrictions with "disparate impact" could be actionable under the Rehabilitation Act without a showing of intentional discrimination; the Court resolved some of the ambiguities in *Davis* by elaborating on the extent of affirmative duties under Sec. 504:

Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it

may be required to make "reasonable" ones. The question after *Alexander* [*v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)] is the rather mushy one of whether some "reasonable accommodation" is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the "otherwise qualified" inquiry, our precedent requires that the "reasonable accommodation" question be decided as an issue of fact -- meaning, of course, that it is one for the trial court or jury, subject to "clearly erroneous" or *Boeing Co. v. Shipman* review only. See *Region 13*, 704 F.2d at 1409." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988).

Citing the Rehabilitation Act of 1973 is appropriate in that the ADA was modeled after it.

"The ADA was modeled in part after the Federal Rehabilitation Act of 1973, as amended 29 U.S.C. @@ 791 and 794(a), which forbids discrimination against individuals employed by the federal government, government contractors and recipients of federal assistance. See 1990 U.S.C.C.A.N., Legislative History P.L. 101-336 [Americans With Disabilities Act] at 337-366. Thus, cases brought under the Rehabilitation Act are instructive with respect to the ADA. *Abbasi v. Herzfeld & Rubin*, P.C., 863 F. Supp. 144, 145 n.1 (S.D.N.Y. 1994). See also *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) ("the employment provisions of the [Americans with Disabilities] Act merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors.") Indeed, the ADA's definitions of reasonable [*26] accommodation and undue hardship are "borrowed from" the regulations promulgated by the Equal Employment Opportunity Commission under the Rehabilitation Act. *Vande Zande*, 44 F.3d at 542; see 34 C.F.R. @@ 104.12(b), (c); 45 C.F.R. @@ 84.12(b), (c)." *Mohamed v. Marriott International*, United States District Court for the Southern District of New York, 1995 U.S. Dist. Lexis 15762.

PROPOSITION II

THE RULES UNDER WHICH PETITIONER WAS SUSPENDED FROM HIS PRACTICE OF LAW HEREIN, 1.01(b)(1) AND 1.03(a), TEXAS RULES OF DISCIPLINARY PROCEDURE, TEXAS GOVERNMENT CODE, V.T.S.C.A., INHERENTLY AND AS APPLIED TO PETITIONER, IMPOSED CRUEL AND UNUSUAL PUNISHMENTS AND EXCESSIVE FINES AND PENALTIES, THEREBY VIOLATING PETITIONER'S RIGHTS UNDER THE 8TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Contrary to respondent's assertion, petitioner did not ask for 'mitigation' in assessing discipline. He simply argued that what

might be discipline for a non-disabled attorney would be 'cruel and unusual punishment' and constitute an 'excessive fine or penalty' for him because of his physical disabilities, and discrimination against him in a manner disallowed under the ADA. This distinction was not made by respondent. Indeed, respondent increased petitioner's active suspension from 3 to 5 months from its first Evidentiary Panel hearing to the second, when the evidence warranted a reduction in the suspension, even outright dismissal of the case.

In its appellate briefs respondent stated:

"Finally, the Eighth Amendment of the U.S. Constitution regarding cruel and unusual punishment does not apply in civil cases. *Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Zwick v. Freeman, 373 F2d 110, 119 (1967); Calzarano v. Liebowitz, 550 F. Supp. 1389, 1390 (N.Y. 1982).*"

Petitioner pled 8th Amendment violations by respondent, which included those of 'cruel and unusual punishment' and 'excessive fines and penalties'. In rebuttal respondent cited 1977 *Ingraham*, from which the dissenting opinions of Justices White, Brennan, Marshall and Stevens actually forecasted the law to come:

"We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. [FN2] The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." Ante, at 1410. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop v. Dulles*, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as retribution, rehabilitation, or deterrence. [FN3] Id., at 96, 78 **1421 S.Ct., at 595. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)." *Id.* at 686.

The matter is now put to rest:

"The United States now argues that "any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted. It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). We disagree." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

"The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning-Ferris*, 492 U.S., at 266-267, 275, 109 S.Ct., at 2916, 2919. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, "as punishment for some offense." Id., at 265, 109 S.Ct., at 2915 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper*, 490 U.S. 435, *2806 447-448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989)" Id. at notes 3, 4.

PROPOSITION III

THE RULES UNDER WHICH APPELLANT WAS SUSPENDED FROM HIS PRACTICE OF LAW HEREIN, 1.01(b)(1) AND 1.03(a), TEXAS RULES OF DISCIPLINARY PROCEDURE, TEXAS GOVERNMENT CODE, V.T.S.C.A., ARE INHERENTLY, AND AS APPLIED TO APPELLANT, SO VAGUE, INDEFINITE, OVERBROAD AND UNCERTAIN AS TO VIOLATE THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent injected eight new charges into its closing argument at its second Panel. None of them had it presented to petitioner in the charges he had been called to defend himself against, though though required to do so under its own Disciplinary Rules, and under the 14th Amendment to the U. S. Constitution. ([SF2-34 & 35], adopting argument and authority in Proposition IV, supra)

In its closing argument at the second Panel hearing respondent asked that American Bar Association general standards, not Texas law, be applied against petitioner in ordering his suspension. This occurred without prior notice to petitioner [SF2-35], as follows:

11 I'd like to direct
12 the Committee's attention to the
13 American Bar Association's standard
14 for imposing lawyer sanctions,
15 specifically Section 4.4 which states
16 that "a suspension is generally
17 appropriate when a lawyer knowingly
18 fails to perform services for a client
19 and causes injury or potential injury
20 to a client."
23 The Commission for Lawyer Discipline
24 therefore speaks [sic] a finding that
Mr.
25 Swisher engaged in this conduct by

36

1 violating Rules 1.01(b)(1) and 1.03(a)
3 that Mr. Swisher
4 be issued a suspension

In its BODA appellate brief, respondent stated:

"Substantial evidence exists to support the findings of the Evidentiary Panel that Swisher neglected Mr. Fisk's case and failed to keep him informed of its status."

This was an overbroad characterization of the *specific* charges respondent gave notice to petitioner he was to defend himself against. The specific charges were that:

a. (Petitioner) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

b. (Petitioner's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

c. (Petitioner) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

Rule 103(a) recites in pertinent part generally that "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Facially it does not require scienter for its violation to be punishable.

Rule 1.01(b)(1) recites in pertinent part generally that "... a lawyer shall not ... neglect a legal matter entrusted to the lawyer;" The Rule is facially circumscribed by Rule 1.01(c), e.g., "As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client ...". Rule 1.01(c) facially requires scienter for its violation.

Rule 103(a), and Rule 1.01(b)(1) if the latter were not restricted by 1.01(c), would mandate, on pain of suspension, that a lawyer never commit a negligent act or omission in representing a client, i.e., that he infallibly represent clients throughout his professional career - an impossible burden.

Restricted by a scienter requirement, as in 1.01(c), the burden would be lifted - if 'conscious disregard' in 1.01(c) comes under the interpretation given it in *Transportation Ins. Co. v. Moriel*, supra,*1, *Farmer v. Brennan, Warden, et al*, U.S.Sup.Ct. [June 6, 1994]*2, and certainly if Texas Disciplinary Rules 5.01*3 and 5.03*4 are applied.

*1 "Although the multiple grounds of recovery in bad faith lawsuits might seem to complicate the gross negligence issue, the proper analysis is relatively simple--gross negligence in the context of insurance is no different from gross negligence in any other context.

(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

The requirement of conscious indifference, which our law requires, is superfluous unless it requires proof that the defendant had actual subjective knowledge of an extreme risk of serious harm." *Moriel*, Id.

In its brief to the Texas Supreme Court, respondent opposed application of *Moriel* scienter:

"Swisher's reliance upon *Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 Tex. 1994)* is misplaced. *Moriel* is a bad faith insurance claim and deals with the traditional definition of gross negligence and how it should be applied in the context of a bad faith insurance coverage dispute."

*2 "This case requires us to define the term -deliberate indifference,- as we do by requiring a showing that the official was subjectively aware of the risk."

*3 Rule 5.01. Responsibilities of a...Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation...if:

(a) The lawyer is a...supervising lawyer and orders, encourages, or knowingly permits the conduct...; or

(b) ...has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.01.

As the Comments to Rule 5.01 state:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person.

5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act.

7. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

*4 Rule 5.03. Responsibilities Regarding Nonlawyer Assistants

(a) a lawyer having direct supervisory authority over the nonlawyer...

(b) ...shall be subject to discipline for the conduct of such a person...if:
(1) the lawyer orders, encourages, or permits the conduct involved; or
(2) the lawyer:
(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.03.

Without the scienter requirement, Rules 1.01(b)(1) or 1.03(a) would punish without warning.

"[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945) (plurality

opinion).

If one or both of Rules 1.01(b)(1) or 1.03(a) were applied against petitioner, *outside the context of the three specific charged events* associated with them*, either those Rules were: (*this happened - see eight new charges respondent presented for first time in its closing argument [SF2-34])

a. unconstitutionally vague and indefinite, for lack of sufficient, indeed any, qualifying event descriptions,

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses [461 U.S. 358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, supra, 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct., at 1248. (FN7)
>
> Although due process does not require "impossible standards" of clarity, see *United States v. Petrillo*, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.
>
> Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1875):
>
> 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.' *Kolender v. Lawson*, 461 U.S. 352, 75 L.Ed.2d

903, 1983.

or were

b. unconstitutional in their application against petitioner for lack of fair notice as to either the reach of the grievance process against him or as to what precise conduct he was charged to answer for.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

The record shows that petitioner was the owner of his firm, and the supervisor of his attorney and non-attorney staff (SF2-8 [Ken Barton], 9, 10 [Mr. Jama], 13 [receptionist], 14 [his people], 23 [other lawyers...Jama...Lyons], 25 [Swisher...lawyer of record], 26 [other lawyers in the office], 28 [Mr. Jama...Lyons], 29 [under appellant direction], 31 [Mr. Ashmore]). As such, his conduct was governed by the provisions of disciplinary Rules 5.01 and 5.03, each of which required, like *Moriel* (supra), actual knowledge of the complaint events to establish his guilt.

"Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals." (Comment 1, Rule 5.03). Since the complaint events involved conduct of petitioner's staff, Rules 5.01 and/or 5.03 either:

a. circumscribe Rules 1.01(b)(1) and 1.03(a), Texas Disciplinary Rules of Professional Conduct, V.T.S.C.A., under which petitioner was suspended from his practice of law, requiring petitioner's knowledge of the complaint events for his conviction, or

(The record conclusively shows petitioner had no such knowledge (SF2-23, 24, 31, 33). Respondent's position is that such knowledge is unnecessary to convict petitioner of the charged events (SF2-24, inapplicability of *Moriel* argument). Rule 1.01 has a 'knowledge' requirement, supra. Rule 1.03(a) does not mention a 'knowledge' requirement.)

Point: If Rules 5.01 and/or 5.03 circumscribe Rules 1.01(b)(1)

and 1.03(a), petitioner is either not guilty as charged (his lack of 'knowledge' was established on the record (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection for lack of application of Rules 5.01 and/or 5.03 to the facts in his case.

b. must be applied in context with Rules 1.01(b)(1) and 1.03(a), or

(The facts of the case come within the purview of Rules 5.01 and/or 5.03, as other lawyer and nonlawyer staff were shown to have been working for petitioner during the complaint events period, supra.)

Point: If Rules 5.01 and/or 5.03 must be applied in context with Rules 1.01(b)(1) and 1.03(a), petitioner is either not guilty as charged (his lack of 'knowledge' was established on the record (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection for lack of application of Rules 5.01 and/or 5.03 to the facts in his case.

c. are reasonably susceptible to interpretation as meant to either circumscribe or be applied in context with Rules 5.01 and/or 5.03, or

Point: If Rules 5.01 and/or 5.03 are reasonably susceptible of interpretation that they are meant to either circumscribe or be applied in context with Rules 1.01 (b) (1) and 1.03 (a), petitioner is either not guilty as charged (his lack of 'knowledge' was established on the record (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection in that:

i. Rules 1.01(b)(1) and 1.03(a) are unconstitutionally vague as to the 'knowledge' requirement,

ii. Rules 5.01 and/or 5.03 are unconstitutionally vague as to the 'knowledge' requirement, or

iii. Rules 1.01(b)(1), 1.03 (a), 5.01 and/or 5.03, taken in combination, are unconstitutionally vague as to the 'knowledge' requirement

d. none of the above.

Point: If Rules 1.01 (b) (1) and 1.03(a) stand alone, escaping inclusion of Rules 5.01 and/or 5.03, petitioner was denied 14th Amendment due process and equal protection in that:

i. Rules 1.01(b)(1) and 1.03(a) are unconstitutionally overbroad for lack of the 'knowledge' requirement, and imposed an impossible and unreasonable burden

upon petitioner (he could not communicate information about certain events when he had no knowledge the events had occurred).

PROPOSITION IV

THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON A VAGUE AND INDEFINITE GENERAL CHARGE, OR TRAP WITHIN IT, UNRELATED TO SPECIFIC DATES, PLACES, EVENTS, PERSONA, MATERIALS, ETC., UNMENTIONED IN THE *SPECIFIC* CHARGES AGAINST PETITIONER, IN VIOLATION OF PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondent injected eight new charges into its closing argument at its second Evidentiary Panel hearing of September, 1996. None of them had it presented to petitioner in the charges he had been called to defend himself against, though respondent was required to present such matters to petitioner under its own disciplinary Rules [V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.16], and under the 14th Amendment to the Constitution of the United States.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

Petitioner had successfully made his defense to the *specific* charges against him. Respondent did not controvert that defense, on closing argument abandoning its own *specific* charges, stating

> "In closing, the failure to file the status report was not an isolated error or omission. [SF2-34]),

and argued the following eight (8) new charges [SF2-34 & 35]:

> The evidence clearly establishes a pattern of neglect. It shows a conscious disregard for the duties owed to Mr. Fisk. First of all, as was earlier testified to, there was no response ever filed to the doctor's motion for summary judgment.[1] An expert witness was never designated.[2] Depositions were never taken.[3] Even

19 after Mr. Swisher's motion to extend
20 time to answer to the motion for
21 summary judgment was granted, there
22 was still no response filed.[4] Mr.
23 Swisher failed to take it upon himself
24 to determine when a response date was
25 due.[5] Mr. Swisher failed to contact

35

1 Mr. Fisk at all during this whole
2 case.[6] He failed to return even one of
3 Mr. Fisk's several phone calls
4 throughout the year.[7] Even after
5 learning of the dismissal, Mr. Swisher
6 failed to contact Mr. Fisk to try to
7 offer any explanation, to try to file
8 a bill of review, to try to save the
9 case in any way.[8] All of the above,
10 again, establishes neglect on the
11 Respondent's part.

1. "Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged." *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

2. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). See also *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (same with respect to "any charge ... that might seriously damage [a person's] standing and associations in his community"); *Paul v. Davis*, 424 U.S. 693, 722-723, 96 S.Ct. 1155, 1170-1171 (1976) (BRENNAN, J., dissenting).

PROPOSITION V

THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON A PREPONDERANCE OF THE EVIDENCE, UNDER THE PROVISIONS OF VERNON'S TEXAS STATUTES AND CODES ANNOTATED, GOVERNMENT CODE, TITLE 2. JUDICIAL BRANCH, SUBTITLE G. ATTORNEYS, TITLE 2, SUBTITLE G--APPENDIX A-1, RULES OF DISCIPLINARY PROCEDURE, PART II, THE DISTRICT GRIEVANCE COMMITTEES, OR V.T.C.A., GOVT. CODE T. 2, SUBT. G APP. A, ST BAR RULES, ART. 10, SEC. 16, RATHER

THAN UPON CLEAR AND CONVINCING PROOF, THAT PETITIONER VIOLATED EITHER RULE 1.01(b)(1) OR RULE 1.03(a), TEXAS RULES OF DISCIPLINARY PROCEDURE, TEXAS GOVERNMENT CODE, V.T.S.C.A., THEREBY DENYING PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE PROVISIONS OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Sec. 2.16. Evidentiary Hearings. Proceedings before an evidentiary panel of the Committee include:

A. Service upon the Respondent of a written statement of the specific charge or charges against the Respondent, together with a copy of the Complaint...

2. A written summary of the issues of fact expected to be contested.

I. The burden of proof is upon the Complainant and the Chief Disciplinary Counsel to prove the material allegations of the charge by a preponderance of the evidence.

b. Section 16. Additional Rules of Procedure

(A) Nature of Proceedings. Disciplinary actions are civil in nature.

(B) Proceedings Governed by Rules of Civil Procedure. Except as otherwise provided in these rules, the Texas Rules of Civil Procedure apply in disciplinary actions.

(C) Standard of Proof. Disciplinary actions shall be proven by a preponderance of the evidence.

The proceedings are actually quasi-criminal (see argument under Proposition X). Petitioner was denied 14th Amendment due process and equal protection by respondent's application of civil safeguards, rather than quasi-criminal ones required under the 14th Amendment's due process and equal protection clauses.

Also, clear and convincing proof was required to make respondent's case against petitioner, not a preponderance of the evidence under Sec. 2.16. Petitioner was denied 14th Amendment due process and equal protection by respondent's application of the latter test to suspend him.

"FN9. In attorney suspension and disbarment cases, the charges must be sustained by clear and convincing proof. *In re Fisher*, 179 F.2d 361, 369 (7th Cir.), cert. denied sub nom. *Kerner v. Fisher*, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950); *In re Ryder*, 263 F.Supp. 360, 361 (E.D.Va.), aff'd 381 F.2d 713 (4th Cir.1967) (adopting the district court's opinion).

PROPOSITION VI

THE RULING WAS IN ERROR IN THAT IT WAS BASED UPON A FINDING OF EITHER 'GROSS NEGLIGENCE' OR 'CONSCIOUS INDIFFERENCE', WHEREIN PETITIONER WAS DENIED THE SUBJECTIVE AWARENESS TEST APPLIED TO OTHER DEFENDANTS IN TEXAS COURTS IN *TRANSPORTATION INS. CO. v. MORIEL*, AND IN V.T.C.A., GOVT. CODE T. 2, SUBT. G APP. A, ART. 10, SEC. 9, RULES 5.01 AND 5.03, THEREBY VIOLATING PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Different from all other Texas citizens, petitioner was denied the subjective awareness test requirement of *Moriel* in determining his guilt of the 'a', 'b' and 'c' charges against him, tacitly admitted by respondent in its briefs to BODA and the Texas Supreme Court:

> "Swisher's reliance upon *Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 Tex. 1994)* is misplaced. *Moriel* is a bad faith insurance claim and deals with the traditional definition of gross negligence and how it should be applied in the context of a bad faith insurance coverage dispute."

Contradicting this position, respondent then applied suspension punishment against petitioner based upon knowing bad conduct. It did so under American Bar Association guidelines, concerning matters outside of those charged against petitioner [Proposition III, supra; SF2-35]: See also Point 3, supra, re Rules 5.01 and 5.03.

PROPOSITION VII

IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE ADA AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON THE FOLLOWING POSITIONS IN RESPONDENT'S BRIEFS TO BODA AND THE TEXAS SUPREME COURT:

a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eighth Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he

has not properly preserved these complaints on appeal."

As to 'a', petitioner could not have raised these arguments during the proceedings because no discipline was assessed during them. When he received notice of the assessed discipline, only then did he realize the federal considerations had not been given, and he timely appealed and therein presented those contentions.

As to 'b':

1. In his sworn injunction action against respondent before the second Panel hearing, Pgh 1, petitioner pled the prima facie elements of his ADA status (Pgh 8, "Plaintiff had polio in 1952, suffering permanent paralysis of both of his arms, and of two-thirds of his breathing strength, the latter forcing his reliance upon iron lungs and respirators in which to sleep at night for the past 42 years.")

   "Plaintiff was at all material times an American individual with physical disabilities that substantially limited one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment." (Appendix H, p. 66)

   "The ADA provides that an individual is disabled if, inter alia, he or she has a physical...impairment that substantially limits one or more of his or her major life activities. 42 U.S.C.A. § 12102(2)." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993; *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y. 1994, 849 F.Supp. 284; *Harmer v. Virginia Electric and Power Company*, 831 F.Supp. 1300, E.D. Va. 1993; "or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)" *Dutton v. Johnson County Board of County Commissioners*, 859 F.Supp. 498, D. Kansas 1994.

   In its answer respondent judicially admitted the truth of the ADA elements, "2. Defendant admits the averments contained in Plaintiff's Paragraph 1 pertaining to his...physical condition.".

2. The Panel had conducted an earlier hearing (Appendix J, p. 79), with petitioner appearing by telephone, on the issue of petitioner's right to the second Panel hearing appearance by telephone on the basis that he qualified for such an accommodation under the ADA. The Panel ruled for petitioner on the issue by granting the second Panel hearing of the Fisk matter.

Also, this action is one by the State of Texas, through its agency the State Bar, against petitioner. The State of Texas has been on notice for years that petitioner is severely disabled [meeting the disjunctive (C) test in 42 U.S.C. § 12102(2), of "...being regarded as having such an impairment."]:

1. It paid his college tuition at the University of Houston in the 1960's because of them.
2. It refunded the taxes on the purchase of his car in 1977 because of them.
3. It provided him a handicapped drivers license because of them (stamping the handicapped code on his drivers license every 3 years since 1976).
4. When sworn in as a new attorney by Judge Wilmer Hunt, 133rd District Court, Harris County, Texas in 1966, in open court before a jury and counsel, interrupting a trial, petitioner testified as to his disabilities on explaining that he could not raise his right hand to take the oath his licensure required.
5. When sworn in by the Grievance Committee on some half-dozen prior occasions over the years, 4 or 5 of those video recorded, he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.
6. When sworn in by the Panel in these proceedings he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.
7. Petitioner's disabilities constituted the foundation of his sworn federal court injunction hearing (supra) at which three attorneys from the State Bar were present, and as a result of which respondent ultimately granted petitioner the right to appear at its second Evidentiary Panel hearing by telephone because he was a disabled American under the A.D.A. The Bar would not have allowed his phone appearance for any other reason. It is from that hearing this appeal was taken.
8. In registering for the draft with the United States at age 18 he was acknowledged by our federal government as being so physically impaired he was unfit for service.
9. More simply, evidence regarding petitioner's disabilities comes from respondent's own witness, e.g., in its First Reply Point respondent recites:

> Mr. Fisk described Swisher by saying "his arms are rather distinctive, like they're paralyzed or something."

(S.F. II. 11).'

10. And the record mentions it (SF2-33):

> 17 Mr. Swisher, have you been able to
> 18 hear us?
> 19 MR. SWISHER: Yes.
> 20 MR. HOWARD: Okay. All right.
> 21 Are you appearing at this hearing by
> 22 telephone at your own request under
> 23 the American Disabilities Act?
> 24 MR. SWISHER: Yes, I am.

PROPOSITION VIII

IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON RESPONDENT'S TWO ARGUED POSITIONS THAT,

a. "The ADA is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101.* None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112.* The State Bar of Texas does not fit in the definition of a "covered entity."'

Respondent cited no case authority for these positions, making reference only to *Title 42 U.S.C.A. §12101 and 12112* of the ADA. Petitioner cited, without rebuttal, the following controverting

authority:

i. "As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993.

ii. Title II of the ADA, 42 U.S.C. § 12131 et seq., which is the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132." *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284.

iii. ADA Sections 12131 through 12134, 42 U.S.C. § 12131-12134, prohibit discrimination in public services... The ADA, 42 U.S.C. § 12101 et seq., provides: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. 42 U.S.C. § 12131(1) defines "public entity" to include any state or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. § 12131(1)(A) and (B).

The ADA is clear: no qualified disabled individual shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *Noland v. Wheatley*, 835 F.Supp. 476, N.D. Indiana, 1993.

iv. [4][5] Admission to the Delaware bar is governed exclusively by this Court. *In re Hudson*, Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. The Board, as an instrumentality of this Court, constitutes a public entity within the meaning of Title II. See 42 U.S.C.A. § 12131(1); Supr.Ct.R. 51. Consequently, as a public entity, the Board must make reasonable accommodations to prevent the de facto exclusion "which may occur when disabled but otherwise qualified individuals are limited by standard administrative or other operating procedures from participating fully...

FN5. In D'Amico, the court pointed out that the ADA defines the term "person" as used in the examination and courses

provision of Title III as having the same meaning given the term in Section 701 of the Civil Rights Act of 1964. Id. (citing 42 U.S.C. § 12111(7)). In the Civil Rights Act, "person" is defined as including governments and governmental agencies. Id. (citing 42 U.S.C. § 2000e(a)). *In re Petition of Rubenstein*, 637 A.2d 1131, Del. 1994.

PROPOSITION IX

THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON AN INCREASE OF STATE BAR ATTORNEY FEE CHARGES FROM $920 (SF1-21) TO $2,770 (SF2-20) AGAINST PETITIONER, AND AN INCREASE OF PETITIONER'S ACTIVE SUSPENSION PERIOD FROM 3 TO 5 MONTHS, IN WRONGFUL RETALIATION AGAINST HIM FOR ASSERTING HIS RIGHT IN FEDERAL COURT TO APPEAR AT THE EVIDENTIARY PANEL HEARING BY PHONE RATHER THAN IN PERSON, BECAUSE OF HIS PHYSICAL DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT, THEREBY VIOLATING PETITIONER'S RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT AND UNDER THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Adopting argument and authoity at Proposition IV, supra.

Respondent increased petitioner's punishment from three to five months active suspension, and his legal fee fine from $920 to $2,770 in retaliation for petitioner's ADA and § 1983 action against respondent.

42 U.S.C. § 12203, Chap. 126(iv). Prohibition against retaliation and coercion. (a) Retaliation.

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Respondent did not rebut petitioner's allegations and record showing of retaliation. With retaliation against petitioner recorded as a matter of law, the rulings against him are in violation of his ADA rights, and his rights to due process and equal protection under the provisions of the 14th Amendment to the Constitution of the United States. In an employment setting the scenario would be:

"[2] A prima facie case creates a rebuttable presumption of intentional discrimination. *Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 283 (5th Cir.1989) (citing *Texas Dep't of*

Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981)). To rebut this presumption the employer must articulate some legitimate, non-discriminatory reason for its action. Id. An employer may sustain this burden by introducing admissible evidence of an explanation that would be "legally sufficient to justify a judgment for the defendant." *Bohrer*, 715 F.2d at 218 (quoting *Burdine*, 450 U.S. at 255, 101 S.Ct. at 1094).

[3] If the employer articulates legitimate, non-discriminatory reasons for its actions, the presumption created by the plaintiff's prima facie case dissolves and the burden reverts to the plaintiff to prove that the employer's reasons were pretextual. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir.1985). The plaintiff can establish pretext by introducing evidence to prove that the reason stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext" for illegal discrimination. *Elliott*, 714 F.2d at 566. The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge. Id." 41 F.2d 374, *Guthrie v. Tifco Industries*, (C.A.5 (Tex.) 1991).

PROPOSITION X

THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT IT WAS BASED UPON THE PREMISE THAT THE DISCIPLINARY SUSPENSION PROCEEDINGS ARE CIVIL IN NATURE, WHEN THEY ARE, INHERENTLY AND AS APPLIED TO THE DISABLED PETITIONER, QUASI-CRIMINAL, THEREBY VIOLATING PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Imposition of sanctions is made under the following Rule:

V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.17. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A-1. Rules Of Disciplinary Procedure. Part II. The District Grievance Committees.

2.17. Imposition of Sanctions

In imposing any Sanctions, the evidentiary panel shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned.

B. The seriousness of and circumstances surrounding the Professional Misconduct.

C. The loss or damage to clients.

D. The damage to the profession.

E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found.

F. The profit to the attorney.

G. The avoidance of repetition.

H. The deterrent effect on others.

I. The maintenance of respect for the legal profession.

J. The conduct of the Respondent during the course of the Committee action.

"(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop v. Dulles*, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as retribution, rehabilitation, or deterrence. [FN3] Id., at 96, 78 **1421 S.Ct., at 595. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)." *Id.* at 686.

"We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S., at 448, 109 S.Ct., at 1902." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

More recently, we have noted that forfeiture serves "punitive and deterrent purposes," *Calero-Toledo*, 416 U.S., at 686, 94 S.Ct., at 2093, and "impos [es] an economic penalty," id., at 687, 94 S.Ct., at 2094. We conclude, therefore, that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment. [FN12]. *Austin*, Id.

PROPOSITION XI

THE RULING AGAINST PETITIONER WAS IN ERROR IN THAT PETITIONER WAS DENIED THE OPPORTUNITY TO APPEAR BEFORE THE TEXAS SUPREME COURT BY VIDEO TELECONFERENCING TO PARTICIPATE IN THE PROCEEDINGS, AS BOTH AN ATTORNEY AND AS A PARTY, AND TO PRESERVE THE VISUAL EVIDENCE THAT HE IS A DISABLED AMERICAN UNDER THE AMERICANS WITH DISABILITIES ACT, THEREBY VIOLATING PETITIONER'S RIGHTS UNDER THE ACT AND HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Both respondent and petitioner requested oral argument, as permitted under the Disciplinary Rules, before the honorable Supreme Court, petitioner to do so by live video teleconferencing under the provisions of the Americans with Disabilities Act. Respondent argued throughout this appeal that petitioner had not proven his disabilities, but did not provide petitioner an opportunity to appear before it by video at either Evidentiary Panel hearing. The Board of Disciplinary Appeals, in Austin, where the Supreme Court is seated, refused petitioner a video hearing, only providing one after petitioner filed suit therefor in federal court. As a result, for the first time, respondent and respondent's counsel were able to see petitioner's paralyzed body. Yet, respondent argued before the honorable Supreme Court thereafter that petitioner had not established his physical disabilities, and the Court affirmed respondent's rulings, partly based upon this respondent argument. These proceedings constitute illegal disparate treatment of, and have had an illegal disparate impact upon, petitioner. Rather than take the legally required ADA affirmative action to accommodate petitioner, to remove the surmountable barriers to his participation in these government proceedings against his property and liberty interests, the State of Texas denied petitioner that participation.

PROPOSITION XII

THE RULE OF DISCIPLINARY PROCEDURE DENYING PETITIONER'S STAY OF SUSPENSION PENDING APPEAL IS UNCONSTITUTIONAL, INHERENTLY AND IN ITS APPLICATION AGAINST PETITIONER, AS IT DENIES DISABLED TEXAS ATTORNEYS THEIR SUBSTANTIVE AND PROCEDURAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

Respondent presented no charge, and no evidence, to petitioner, nor does the Rule require it, setting out a basis for its determination that petitioner's continued practice of law, under stay of suspension pending appeal, posed a continuing threat to the welfare of his clients or to the public. Petitioner therefore had no fair and timely notice as to what he was to defend himself against in order to obtain a stay of his suspension pending appeal. Such a stay is mandatory under the Disciplinary Rules (V.T.C.A., Govt. Code T.

2, Subt. G App. A, St Bar Rules, Art. 10, Sec. 22; V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.21.

B. An order of suspension must be stayed during the pendency of any appeals therefrom if the evidentiary panel finds, upon competent evidence, that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public. An evidentiary panel may condition its stay upon reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, (or it may impose a requirement of an affirmative act such as an audit of a Respondent's client trust account), short of a showing that appellant's continued practice of law constitutes a danger to his clients and/or to the public.

"It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact (*Vanderhoof v. People of State of Colorado*, 152 Colo. 147, 149, 380 P.2d 903, 904) that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed [386 U.S. 609] not so much as retribution as it is to keep individuals from inflicting future harm. (FN1) *United States v. Brown*, 381 U.S. 437, 458, 85 S.Ct. 1707, 1720, 14 L.Ed.2d 484.

The Court of Appeals for the Third Circuit in speaking of a comparable Pennsylvania statute (FN2) said:

'It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those [386 U.S. 610] safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.' *United States ex rel. Gerchman v. Maroney*, 3 Cir., 355 F.2d 302, 312.

[5] We agree with that view. Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' (*Graham v. State of West Virginia*, 224 U.S. 616, 625, 32 S.Ct. 583, 56 L.Ed. 917) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' *Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 504, 7 L.Ed.2d 446; *Chandler v. Fretag*, 348 U.S. 3, 8,

75 S.Ct. 1, 99 L.Ed. 4. Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. * * * None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act. We therefore hold that it is deficient in due process as measured by the requirements of the Fourteenth Amendment. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923." *Specht v. Patterson*, 87 S.Ct. 1209, 386 U.S. 605 (U.S.Colo. 1967).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Jack G. Swisher, *pro se*
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161, fax 713/978-6342

PROOF OF SERVICE

I, Jack G. Swisher, petitioner, depose and say that on _____, 1996, I served 3 copies of this Petition For a Writ of Certiorari to the Texas Supreme Court on the State Bar of Texas, an agency of the State of Texas, respondent, by mailing them in duly addressed envelopes, first-class postage prepaid to Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701. All parties required to be served have been served.

Jack Swisher, Petitioner, *pro se:*

_____

Subscribed and sworn to before me at Houston, Harris County, Texas this _____, 1996.

_____

Notary Public in and for Harris County, Texas

REQUEST FOR ORAL ARGUMENT APPEARANCE BY VIDEO TELECONFERENCING

Petitioner is an American individual with physical disabilities that substantially limit one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment.He's had two paralyzed arms and loss of two-thirds of his breathing strength since the Houston polio epidemic of 1952, requiring his having to sleep at night in a respirator since then, and he spends most of the day using one. He was and is one of a class of individuals protected by the provisions of Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. ("ADA").

For purposes of this request, he is also one of a class of individuals protected by the provisions of the Federal Rehabilitation Act of 1973, assuming his standing as an attorney licensed to practice before the federal Southern and Eastern District Courts of Texas so permit, but for loss of that standing due to the lower State court's ruling herein appealed.

He comes to this honorable Court *pro se*, but requests permission under the Federal Rehabilitation Act of 1973 to present oral argument in his own behalf by effective, live video teleconferencing, which he is willing to provide at no expense to the Court, in order to remove the extreme though surmountable transportation and communication barriers to his participation in these proceedings. He is permitted under the ADA to so appear in the Texas First and Fourth Courts of Appeal, Houston and San Antonio, respectively (Appendix U, p. 137).

I, Jack G. Swisher, petitioner herein, depose and say that on _____, 1996, I read the above and foregoing request for appearance by video teleconferencing and swear that same is true and correct, to certify which my signature is said date below subscribed.

_____

Subscribed and sworn to before me at Houston, Harris County, Texas this _____, 1996.

_____

Notary Public in and for Harris County, Texas

APPENDICES INDEX
Orders, Opinions, Pleadings, and Motions Below

A. The only written opinion in the case is that by the State Bar Evidentiary Panel on September 29, 1994 in its ruling suspending petitioner from the practice of law for one year, the last seven months probated 1

B. The Board of Disciplinary Appeals ("BODA") judgment of August 3, 1995 affirming the Evidentiary Panel ruling 9

C. By May 2, 1996 notice letter from the Clerk of the Texas Supreme Court, the Court affirmed the BODA ruling 10

D. Petitioner's first amended motion for rehearing was then timely filed with the Texas Supreme Court.....11

E. Petitioner's first amended motion for rehearing was denied by the Court on May 2, 1996.....32

F. Petitioner's second amended motion for rehearing was thereafter filed with the Court..... 33

G. But it was returned without consideration, again via Clerk, May 2, 1996, as no provision in the Texas Rules of Appellate Procedure authorized 'a second motion for rehearing' 65

H. Petitioner's collateral action to enjoin respondent from carrying out the Panel's first suspension ruling of July 9, 1994, and to obtain a rehearing before the Panel wherein petitioner could appear and defend himself by telephone. The action, styled Jack Swisher v. State Bar of Texas, Civil Action No. H-94-2653, federal Southern district, Houston Division, brought under Title 42 U.S.C. § 1983, and Title 42 U.S.C., Sec 12101, et seq, Chap. 126, Americans with Disabilities Act ["ADA"], and 14th Amendment. The federal court hearing was reset for a week to allow the Panel time to permit petitioner to appear by telephone at a Panel rehearing of his case. Appearance by telephone, rather than in person, was to be an accommodation to petitioner because of his disabilities under the ADA, by removing transportation and communication barriers to his participation in the proceedings. 66

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APPENDICES

BEFORE THE EVIDENTIARY PANEL FOR THE STATE BAR DISTRICT NO. 041, THE STATE BAR OF TEXAS

STATE BAR OF TEXAS	§	
v.	§	NO. H0029302513
JACK SWISHER, JR.	§	
Houston, Texas	§	

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

On September 20, 1994 came on to be heard the above styled complaint. The Commission for Lawyer Discipline appeared by and through their attorney, Elaine Machuga Moore, Assistant Disciplinary Counsel. The Respondent, Jack G. Swisher, Jr., Texas Bar No. 19589000, ("Respondent"), appeared pro se and via telephone pursuant to Respondent's request. The complaining witness, Johnny J. Fisk, ("Fisk"), appeared.

An Investigatory Panel of the Grievance Committee for the State Bar District 04J heard the complaint of Fisk and found just cause to believe that the Respondent had committed professional misconduct. This matter has been brought before an Evidentiary Panel of the District 041 Grievance Committee, pursuant to Rule 2.13 of the Texas Rules of Disciplinary Procedure.

The Evidentiary Panel has issued a Findings of Fact and Conclusions of Law on file herein, and said findings and conclusions support a Judgment of Partially Probated Suspension and by reason of said findings and conclusions, the Panel is of the opinion that Respondent is guilty of professional misconduct and should be suspended for a period of one (1) year, with a portion of such suspension being probated under the following terms and conditions.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Respondent be and is hereby suspended from the practice of law for a period of one (1) year, beginning thirty (30)

days from the date of the signing of this judgment, with the final seven (7) months probated under the following terms and conditions:

1. Respondent shall not violate any of the provisions of the Texas Disciplinary Rules of Professional Conduct nor any provision of the state Bar Rules.

2. Respondent shall not violate the laws of the United States or any other state other than minor traffic violations.

3. Respondent shall maintain a current status regarding membership fees in accordance with Article III of State Bar Rules;

4. Respondent shall comply with Minimum Continuing Legal Education (MCLE) requirements in accordance with Article III of the State Bar Rules;

5. Respondent shall comply with Interest on Lawyers Trust Account requirements in accordance with Article XI of the State Bar Rules;

6. Respondent shall pay attorney's fees in the amount of $2,770.00 incurred in the prosecution of this compliant in accordance with the terms contained in this order.

IT IS FURTHER ORDERED that the partially probated suspension entered herein not be stayed during the pendency of any appeals therefrom.

IT IS FURTHER AGREED and ORDERED that upon determination by the Board of Disciplinary Appeals that Respondent has violated any of the terms or conditions of probation, the Board shall enter an order revoking the probation and imposing the active suspension of the Respondent from the practice of law for a period of seven (7) months, commencing on or after the date of revocation, upon the following conditons:

1.Any grievance committee of the State Bar of Texas or the General Counsel of the State Bar of Texas may apply for revocation

to the Board of Disciplinary Appeals, by filing a written motion to revoke probation;

2.Acopy of the Motion to Revoke Probation and Notice of Hearing on such Motion shall be delivered to Respondent pursuant to Rule 2.20, Texas Rules of Disciplinary Procedure, at Respondent's last known address on the membership rolls for the Supreme Court of Texas; and

3.The Board shall hear the Motion to Revoke Probation within thirty (30) days of service upon Respondent, and shall determine whether Respondent has violated any of the terms or conditions of probation by a preponderance of the evidence.

It is further AGREED AND ORDERED that during any term of active suspension that my be imposed upon Respondent by the Board of Disciplinary Appeals by reason of Respondent's failure to adhere to the terms of this Judgment, Respondent shall be prohibited from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representatie capacity in any proceeding in any Texas court or berfore any administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law", "attorney", "counselor at law", or "lawyer".

It is further ORDERED that Respondent shall immediately notify each of his/her current clients in writing of this suspension. In addition to such notification, Respondent is ORDERED to return any files, papers, unearned monies and other property belonging to clients and former clients in the Respondent's possession to the r e spective clients or former clients or to another attorney at the client's or former client's request. Said Respondent is ORDERED to file with the State Bar of Texas, 1111 Fannin, Suite 1370, Houston,

Texas 77002, within thirty (30) days of the date of the signing of this Judgment an affidavit stating that all current clients have been notified of the Respondent's suspension and that all files, papers, monies and other property belonging to all clients and former clients have been returned as ordered herein.

It is further ORDERED that Respondent shall, on or before thirty (30) days from the effective date of this Judgment, notify in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which the Respondent has any matter pending of the terms of this Judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing in Court. Said Respondent is ORDERED to file with the State Bar of Texas, 1111 Fannin, Suite 1370, Houston, Texas 77002, within thirty (30) days of the date of the effective date of this Judgment an affidavit stating that he has notified in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which the respondent has any matter pending of the terms of this Judgment, the style and cause number of the pending matter(s), and thename, address and telephone number of the client(s) Respondent is representing in Court.

IT IS FURTHER ORDERED that Respondent shall immediately surrender his law license and permanent State Bar Car to the State Bar of Texas, 1111 Fannin, Suite 1370, Houston, Texas 77002, Texas to bew forwarded to the Supreme Court of the State of Texas.

IT IS FURTHER ORDERED that Respondent pay, by cashier's check or money order, $2,770.00 in attorneys' fees to the General Counsel, State Bar of Texas, 1111 Fannin, Suite 1370, Houston, Texas 77002, on or before the end of Respondent's five (5) months

active term of suspension.

IT IS FURTHER ORDERED that this Partially Probated Suspension is to be made a matter of record and appropriately recorded in accordance with the Texas Rules of Disciplinary Procedure.

SIGNED this 29th day of September, 1994.

EVIDENTIARY PANNEL
DISTRICT NO. 041
STATE BAR OF TEXAS

BY: _____
Steve Howard
Chairperson

BEFORE THE EVIDENTIARY PANEL FOR THE STATE BAR DISTRICT NO. 041 THE STATE BAR OF TEXAS

STATE BAR OF TEXAS	§	
v.	§	
JACK G. SWISHER, JR.	§	H0029302513
Houston, Texas	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 20, 1994 came on to be heard the above styled complaint. The Commission for Lawyer Discipline appeared by and through their attorney, Elaine Machuga Moore, Assistant Disciplinary Counsel. The Respondent, Jack G. Swisher, Jr., Texas Bar Number 19589000, ("Respondent"), appeared pro se and via telephone pursuant to Respondent's request. The complaining witness, Johnny J. Fisk, ("Fisk"), appeared.

An investigatory panel of the Grievance Committee for State Bar District 04J heard the complaint of Johnny J. Fisk and found just cause to believe that the Respondent had committed professional misconduct. This matter has been brought before an Evidentiary Panel of the District 04I Grievance Committee, pursuant to Rule 2.13 of the Texas Rules of Ddisciplinary Procedure.

The Evidentiary Panel has conducted a hearing on this matter and having heard and considered all of the testimony and evidence submitted, makes the following findings of fact and conclusions of law.

I.
FINDINGS OF FACT

1) Respondent is a licensed attorney and member of the State Bar of Texas, residing or maintaining an office in Houston, Harris County, Texas.

2) In or about April 1988, Fisk retained Respondent to prosecute a civil claim. Respondent failed to file a court ordered status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593. As a result of Respondent's failure

to file the status report, Fisk's case was dismissed by the Court on December 27, 1991 for want of prosecution.

3) Although Respondent was contacted by Fisk subsequent to the December 27, 1991 dismissal, Respondent failed to inform Fisk of the dismissal. Instead, Fisk discovered that his case had been dismissed on January 20, 1993 when he contacted the 127th Judicial District Court directly to ascertain the status of his case. Respondent further failed to respond to and return Fisk's phone calls upon Fisk learning of the dismissal.

4) Respondent's continued practice of law pending any appeals of this partially probated suspension poses a substantial threat of irreparable harm to Respondent's clients or prospective clients. 5)The General Counsel of the State Bar of Texas has incurred reasonable attorneys' fees and direct expenses associated with the proceedings of this matter in the amount of $2,770.00 which should be paid by Respondent

II
CONCLUSIONS OF LAW

The foregoing findings of fact support a violation of the following Rules of the Texas Disciplinary Rules of Professional Conduct: 1.01 (b) (1) for neglecting the legal matter entrusted to Respondent by Fisk and Rule 1.03 (a) for failing to keep Fisk reasonably informed about the status of his case and promptly comply with Fisk's reasonable re quests for information.

SIGNED and ENTERED this 29th day of September, 1994.

EVIDENTIARY PANEL
DISTRICT NO. 041

BY: _____
Steve Howard
Presiding Member

BEFORE THE
SUPREME COURT OF TEXAS
BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER, JR.	§	
v.	§	CAUSE NO. 05304
COMMISSION FOR LAWYER	§	
DISCIPLINE	§	

JUDGMENT

On July 28, 1995, came on to be heard before the Board of Disciplinary Appeals an appeal by Respondent below JACK G. SWISHER, JR. to revise or reverse the Judgment of Partially Probated suspension dated September 29, 1994, issued by the evidentiary panel of the State Bar of Texas District 041 grievance committee in Cause No. H0029302513.

The Board of Disciplinary Appeals, having considered the record, briefs, and argument of counsel, is of the opinion that the decision of the evidentiary panel should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the evidentiary panel of the state Bar of Texas holding that JACK G. SWISHER, JR. committed professional misconduct and suspending him for a period of one year with the final seven (7) months probated under certain terms and conditions be, and hereby is, affirmed.

It is further ORDERED that, in accordance with the original Judgment of Partially Probated Suspension, the suspension shall begin thirty (30) days from the date this judgment is signed.

SIGNED this 3rd day of August, 1995.

STEVEN J. WATKINS, CHAIRMAN
BOARD OF DISCIPLINARY APPEALS

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 2, 1996

Mr. Jack Swisher
1445 North Loop W., Suite #110
Houston, TX 77008-1600

Ms. Christine E. McKeema
Board of Disciplinary Appeals
P. O. Box 12426
Austin, TX 78711

Ms. Linda A. Acevedo
State Bar of Texas
Assistant General Counsel
P. O. Box 12487
Austin, TX 78711

RE: Case Number 95-0779
Style: JACK G. SWISHER v. THE STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas affirmed the decision of the Board of Disciplinary Appeals in the above numbered and styled case. Motion for extension of time to file brief granted to November 14, 1995. Stay order dated August 30, 1995, is lifted.

Sincerely,

John T. Adams, Clerk

by _____
Blanca E. Morin, Deputy

THE SUPREME COURT OF TEXAS

No. 95-0779

JACK SWISHER, PETITIONER

v.

THE STATE BAR OF TEXAS, RESPONDENT

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

APPELLANT'S FIRST AMENDED MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

The honorable Supreme Court entered its decision of April 12, 1996, affirming the Board of Disciplinary Appeals' decision, suspending appellant from the practice of law for one year, with the last seven (7) months probated. Appellant respectfully requests rehearing, and that the Court give its guidance on the first impression issues presented, including those involving the Americans with Disability Act, 14th Amendment rights for disabled attorneys, the inherent and applied 14th Amendment disparate impacts of the punitive measures of the Disciplinary Rules on disabled attorneys, of which class appellant is a member who was injured thereby, and the inherent and applied 8th Amendment impacts of the punitive measures of the Disciplinary Rules on disabled attorneys, of which class appellant is a member who was injured thereby.

Appellant raises federal considerations in this appeal, ones involving the 8th and 14th Amendments to the U. S. Constitution,

Title 42 U.S.C. § 1983, and Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. All conflicts between Texas statutory and case law and federal statutory and case law are to be resolved in favor of the federal law in these proceedings.

We recognize that - the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.- *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975). But under the Supremacy Clause, from which our pre-emption doctrine is derived, - any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.- *Felder v. Casey*, 487 U. S., at 138 (quoting *Free v. Bland*, 369 U. S. 663, 666 (1962)); see also *De Canas v. Bica*, 424 U. S. 351, 357 (1976) (- even state regulation designed to protect vital state interests must give way to paramount federal legislation-). *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. _____ (1992).

Appellant's right to earn legal fees are property interests protected under the Constitution of the United States.

"Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). It is well settled that an interest attains the status of "property" by virtue of the fact that it has been initially recognized and protected by federal or state rules of law. It is also well established that a mutually recognizable entitlement will receive constitutional protection. *Brown v. Ledbetter*, 569 F.Supp. 170, 172 (N.D.Ga.1983) (citations omitted)." *Bodiford v. State Of Alabama, et al.*, 854 F.Supp. 886, 1994.

In appellant's case, because he is a severely disabled American, cognizable under the Americans with Disabilities Act, his rights to earn legal fees are inextricably intertwined with his liberty rights protected under the 14th Amendment to the Constitution of the United States.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

"As a qualitative matter, we have decided that the liberty secured

by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint. Although its contours have never been defined precisely, that liberty surely includes the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place. (FN6) On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. Cf. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). At the same time, however, we have recognized that a variety of state actions have such serious effects on protected liberty interests that they may not be undertaken arbitrarily, (FN7) or without observing procedural safeguards. (FN8)

In my opinion, the formal commencement of a criminal proceeding is quintessentially this type of state action. The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately produces "a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 814, 107 S.Ct. 2124, 2141, 95 L.Ed.2d 740 (1987). Every prosecution, like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). In short, an official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection. (FN9)" *Albright v. Oliver*, 114 S.Ct. 1340, 127 L.Ed.2d 114, 62 USLW 4078, 1994.

More particularly, the following points of error, expressed either as such or as issues that have been presented and ruled upon by the honorable Supreme Court, make up the foundation of this motion.

POINTS OF ERROR

1. The Rules under which appellant was suspended from his practice of law, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., both inherently and as applied to appellant, have an illegal disparate impact on disabled attorneys under the Americans with Disabilities Act, of which class appellant is a member, and thereby violated appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the .

United States.

2. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., as applied to appellant, imposed cruel and unusual punishments and excessive fines and penalties upon him, thereby violating his rights under the 8th Amendment to the Constitution of the United States.

3. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., are inherently, and as applied to appellant, so vague, indefinite, overbroad and uncertain as to violate the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

4. The ruling against appellant was in error in that it was based upon a vague and indefinite general charge, or trap within it, unrelated to specific dates, places, events, persona, materials, etc., in violation of appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

5. The ruling against appellant was in error in that it was based upon a preponderance of the evidence, under the provisions of Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendix A-1, Rules Of Disciplinary Procedure, Part II, The District Grievance Committees, rather than upon clear and convincing proof, that appellant violated either Rule 1.01 (b) (1) or Rule 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., thereby denying appellant's due process and equal protection rights under the provisions of the 14th Amendment to the Constitution of the United States.

6. The ruling was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test applied to other defendants in Texas courts under *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), thereby violating Appellant's due process and equal protection rights under the 14th apAmendment to the Constitution of the United States.

7. The ruling against appellant was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test required by the due process and equal protection

clauses of the 14th Amendment to the Constitution of the United States.

8. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's argued positions that,

   a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eight Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

   b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints on appeal."

9. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's two argued positions that,

   a. "The Americans with Disabilities Act ("ADA") is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101*. None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

   b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of

employment. *Title 42 U.S.C.A. §12112.* The State Bar of Texas does not fit in the definition of a "covered entity."'

10. The ruling against appellant was in error in that it was based upon an increase of State Bar attorney fee charges from $900+ to $2,700+ against appellant, and an increase of appellant's active suspension period from 3 to 5 months, in wrongful retaliation against him for asserting his right in federal court to appear at the Evidentiary Panel hearing by phone rather than in person, because of his physical disabilities under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act, under 42 U.S.C. § 1983, the federal Civil Rights Act, and under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

11. The ruling against appellant was in error in that it was based upon the premise that the disciplinary suspension proceedings are civil in nature, rather than quasi-criminal, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

12. The ruling against appellant was in error in that appellant was denied the opportunity to appear before the Texas Supreme Court by video teleconferencing to participate in the proceedings, as both an attorney and as a party, and to preserve the visual evidence that he is a disabled American cognizable under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act and his due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

POINTS OF ERROR RESTATED

1. The Rules under which appellant was suspended from his practice of law, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., both inherently and as applied to appellant, have an illegal disparate impact on disabled attorneys under the Americans with Disabilities Act, of which class appellant is a member, and thereby violated appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

The punishment provisions of the Disciplinary Rules, i.e., suspension from law practice, forcing severely disabled attorneys to obtain a livelihood by other means during the suspension, fall

unequally and more harshly upon disabled attorneys than upon non-disabled attorneys. There is simply a much greater difficulty for severely disabled vs. non-disabled attorneys to obtain a livelihood by other means than law practice during a period of suspension. 'Suspension from practice', active and probationary, constitutes part of appellee's program governing the practice of law in Texas. Disabled attorneys, under the Americans with Disabilities Act (and under the federal Rehabilitation Act of 1973, as Texas is a grantee of federal funds), have a 14th Amendment right to share equally in that program, and not be exposed to more severe punishments under it because of their physical disabilities. The burden is on the State to take affirmative action to ensure an even playing field for the disabled through reasonable accommodation.

In construing the federal Rehabilitation Act of 1973, having language nearly identical to that of the Americans with Disabilities Act, the United States Supreme Court made the following observations:

"In another unanimous decision, *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that some sorts of restrictions with "disparate impact" could be actionable under the Rehabilitation Act without a showing of intentional discrimination; the Court resolved some of the ambiguities in Davis by elaborating on the extent of affirmative duties under Sec. 504:

Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.The question after *Alexander* [*v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)] is the rather mushy one of whether some "reasonable accommodation" is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the "otherwise qualified" inquiry, our precedent requires that the "reasonable accommodation" question be decided as an issue of fact--meaning, of course, that it is one for the trial court or jury,

subject to "clearly erroneous" or *Boeing Co. v. Shipman* review only. See Region 13, 704 F.2d at 1409." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988)

Citing the federal Rehabilitation Act of 1973 is appropriate in that the Americans with Disabilities Act was modeled after it.

"The ADA was modeled in part after the Federal Rehabilitation Act of 1973, as amended 29 U.S.C. @@ 791 and 794(a), which forbids discrimination against individuals employed by the federal government, government contractors and recipients of federal assistance. See 1990 U.S.C.C.A.N., Legislative History P.L. 101-336 [Americans With Disabilities Act] at 337-366. Thus, cases brought under the Rehabilitation Act are instructive with respect to the ADA. *Abbasi v. Herzfeld & Rubin*, P.C., 863 F. Supp. 144, 145 n.1 (S.D.N.Y. 1994). See also *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) ("the employment provisions of the [Americans with Disabilities] Act merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors.") Indeed, the ADA's definitions of reasonable [*26] accommodation and undue hardship are "borrowed from" the regulations promulgated by the Equal Employment Opportunity Commission under the Rehabilitation Act. *Vande Zande*, 44 F.3d at 542; see 34 C.F.R. @@ 104.12(b), (c); 45 C.F.R. @@ 84.12(b), (c). Given these similarities, the paucity of case law in this Circuit on the ADA, and the etiology of the ADA, the Court of Appeals' construction of these terms in the context of the Rehabilitation Act provides substantial guidance." *Mohamed v. Marriott International*, United States District Court for the Southern District of New York, 1995 U.S. Dist. Lexis 15762.

2. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., as applied to appellant, imposed cruel and unusual punishments and excessive fines and penalties upon him, thereby violating his rights under the 8th Amendment to the Constitution of the United States.

Appellant does not ask for 'mitigation' in assessing discipline. He simply points out that what might be discipline for a non-disabled attorney would be 'cruel and unusual punishment' and constitute an 'excessive fine or penalty' for appellant because of his physical disabilities, discriminating against him in a manner disallowed under the Americans with Disabilities Act. That such a consideration was

never made by Appellee is clear, since it increased appellant's suspension from 3 to 5 months from the first hearing to the second, when the evidence warranted a change in the opposite direction. Even now it wrongly views the issue as one of 'mitigation'.

In its BODA appellate brief, Appellee further stated:

Finally, the Eight Amendment of the U.S. Constitution regarding cruel and unusual punishment does not apply in civil cases. *Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Zwick v. Freeman, 373 F2d 110, 119 (1967); Calzarano v. Liebowitz, 550 F. Supp. 1389, 1390 (N.Y. 1982).*

Appellant plead 8th Amendment violations by appellee, which includes those of 'cruel and unusual punishment' and 'excessive fines and penalties'. In arguing that these violations do not apply in civil cases appellee is simply wrong. Appellee cites 1977 *Ingraham*, from which the dissenting opinions of Justices White, Brennan, Marshall and Stevens actually forecasted the law to come:

"We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. [FN2] The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." Ante, at 1410. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." Trop v. Dulles, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as retribution, rehabilitation, or deterrence. [FN3] Id., at 96, 78 **1421 S.Ct., at 595. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)." *Id.* at 686.

The matter is now put to rest:

"The United States now argues that "any claim that the government's conduct in a civil proceeding is limited by the Eighth

Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted. It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). We disagree." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993)

"In Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. Id., at 665, 97 S.Ct., at 1409. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears designed to catalogue the misdeeds of James II, see ibid., rather than to define the scope of the substantive rights set out in subsequent sections." Id. at note 5.

"The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning- Ferris*, 492 U.S., at 266-267, 275, 109 S.Ct., at 2916, 2919. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, "as punishment for some offense." Id., at 265, 109 S.Ct., at 2915 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper*, 490 U.S. 435, *2806 447-448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989)" Id. at notes 3, 4.

3. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., are inherently, and as applied to appellant, so vague, indefinite, overbroad and uncertain as to violate the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

   In its BODA appellate brief, Appellee stated:

   "Substantial evidence exists to support the findings of the Evidentiary Panel that Swisher neglected Mr. Fisk's case and failed to keep him informed of its status."

   This was an overbroad characterization of the *specific*

charges Appellee gave notice to Appellant he was to defend himself against. The charges were that:

a. (Appellant) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

b. (Appellant's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

c. (Appellant) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

Rule 1.01 (b) (1), if not restricted by (c), would mandate, on pain of suspension, that a lawyer never commit a negligent act or omission in representing a client, i.e., that he infallibly represent clients throughout his professional career - an impossible burden.

Restricted by (c), on the other hand, the burden would be lifted, perhaps properly - if 'conscious disregard' in (c) comes under the interpretation given it in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. - Jun, 1994).

"[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945) (plurality opinion).

If one or both of Rules 1.01 (b) (1) or 1.03 (a) were applied against Appellant, *outside the context of the three specific charged events associated with them by appellee*, either those Rules were

a. unconstitutionally vague and indefinite, for lack of sufficient, indeed any, qualifying event descriptions,

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39

L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses [461 U.S. 358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, supra, 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct., at 1248. (FN7)

Although due process does not require "impossible standards" of clarity, see United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

Our concern for minimal guidelines finds its roots as far back as our decision in United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875):

'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.' *Kolender v. Lawson*, 461 U.S. 352, 75 L.Ed.2d 903, 1983.

or were

b. unconstitutional in their application against Appellant for lack of fair notice as to either the reach of the grievance process against him or as to what precise conduct he was charged to answer for.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

4. The ruling against appellant was in error in that it was based

upon a vague and indefinite general charge, or trap within it, unrelated to specific dates, places, events, persona, materials, etc., in violation of appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

1. "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

2. Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged. *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

3. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). See also *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (same with respect to "any charge ... that might seriously damage [a person's] standing and associations in his community"); *Paul v. Davis*, 424 U.S. 693, 722-723, 96 S.Ct. 1155, 1170-1171 (1976) (BRENNAN, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' ").

5. The ruling against appellant was in error in that it was based upon a preponderance of the evidence, under the provisions of Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendix A-1, Rules Of Disciplinary Procedure, Part II, The District Grievance Committees, rather than upon clear and convincing proof, that appellant violated either Rule 1.01 (b) (1) or Rule 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., thereby denying appellant's due process and equal protection rights under the provisions of the 14th Amendment to the Constitution of the United States.

"FN9. In attorney suspension and disbarment cases, the charges must be sustained by clear and convincing proof.

In re Fisher, 179 F.2d 361, 369 (7th Cir.), cert. denied sub nom. *Kerner v. Fisher*, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950); *In re Ryder*, 263 F.Supp. 360, 361 (E.D.Va.), aff'd 381 F.2d 713 (4th Cir.1967) (adopting the district court's opinion).

6. The ruling was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test applied to other defendants in Texas courts under *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), thereby violating Appellant's due process and equal protection rights under the 14th apAmendment to the Constitution of the United States.

"Although the multiple grounds of recovery in bad faith lawsuits might seem to complicate the gross negligence issue, the proper analysis is relatively simple--gross negligence in the context of insurance is no different from gross negligence in any other context.

(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

The requirement of conscious indifference, which our law requires, is superfluous unless it requires proof that the defendant had actual subjective knowledge of an extreme risk of serious harm." *Moriel*, Id.

7. The ruling against appellant was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test required by the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

Appellee singled out appellant in applying either a negligence standard, or a gross negligence standard based upon a single-prong objective test, in levying its attorney fee and suspension fine/penalty/punishment against appellant. This violated appellant's 14th Amendment due process and equal protection rights because a subjective test for gross negligence must be met before appellant may be punished by such fines, penalties, punishment, loss of property and liberty rights, and punitive damage awards

(*Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. - Jun, 1994)).

"A prison official's -deliberate indifference- to a substantial risk of serious harm to an inmate violates the Eighth Amendment. See *Helling v. McKinney* 509 U. S. __ (1993); *Wilson v. Seiter*, 501 U. S. 294 (1991); *Estelle v. Gamble*, 429 U. S. 97 (1976). This case requires us to define the term -deliberate indifference,- as we do by requiring a showing that the official was subjectively aware of the risk." *Farmer v. Brennan, Warden, et al*, U.S.Sup.Ct. [June 6, 1994].

"FN10. In addition to ensuring fair notice, vagueness doctrine also guards against " 'harsh and discriminatory enforcement ... against particular groups deemed to merit [official] displeasure.' " *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110 (1972) (citation omitted); see also Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983). Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction. See, e.g., Comment, Controlling Lawyers by Bar Associations and Courts, 5 Harv.Civ.Rights-Civ.Lib.L.Rev. 301, 312-314 (1970); Comment, The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: What Ever Happened to Spevak?, 23 Vill.L.J. 127, 135-136 (1977). See also n. 11, infra." 105 S.Ct. 2265, 471 U.S. 626, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, (U.S.Ohio 1985)

8. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's argued positions that,

   a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eight Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

   b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints

on appeal."

Appellant could not have raised these arguments during the proceedings because no discipline was assessed during them. When he received notice of the assessed discipline, appellant timely appealed and therein presented the contentions mentioned.

Also, this action is that of the State of Texas, through its agency the State Bar, against appellant, a disabled American citizen under the Americans with Disabilities Act. The State of Texas has been on notice for years that Appellant is severely disabled:

1. It paid his college tuition at the University of Houston in the 1960's because of them.
2. It refunded the taxes on the purchase of his car in 1977 because of them.
3. It provided him a handicapped drivers license because of them (stamping the handicapped code on his drivers license every 3 years since 1976).
4. When sworn in as a new attorney by Judge Wilmer Hunt, 133rd District Court, Harris County, Texas in 1966, in open court before a jury an counsel, interrupting a trial, appellant testified as to his disabilities on explaining that he could not raise his right hand to take the oath his licensure required.
5. When sworn in by the Grievance Committee on some dozen prior occasions over the years, 4 or 5 of those video recorded, he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.
6. When sworn in by the Evidentiary Panel in these proceedings he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.
7. Appellant's disabilities constituted the foundation of his sworn federal court injunction hearing at which three attorneys from the State Bar were present, and as a result of which the Bar granted appellant the right to appear at its second Evidentiary Panel hearing by telephone because he was a disabled American under the A.D.A. The Bar would not have allowed his phone appearance for any other reason. It is from that hearing this appeal was taken.
8. In registering for the draft with the United States at

age 18 he was acknowledged by our federal government as being so physically impaired he was unfit for service.

9. More simply, evidence regarding appellant's disabilities comes from appellee's own witness, e.g., in its First Reply Point appellee recites:

'Mr. Fisk described Swisher by saying "his arms are rather distinctive, like they're paralyzed or something." (S.F. II. 11).'

9. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's two argued positions that,

a. "The Americans with Disabilities Act ("ADA") is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101*. None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112*. The State Bar of Texas does not fit in the definition of a "covered entity."'

Appellee cited no case authority for these positions, making reference only to *Title 42 U.S.C.A. §12101 and 12112* of the Americans with Disabilities Act. Appellant cited the following authority which controverts appellee's argued positions:

i. "As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d

713, 1993.

ii. Title II of the ADA, 42 U.S.C. § 12131 et seq., which is the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132." *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284.

iii. ADA Sections 12131 through 12134, 42 U.S.C. § 12131-12134, prohibit discrimination in public services... The ADA, 42 U.S.C. § 12101 et seq., provides: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. 42 U.S.C. § 12131(1) defines "public entity" to include any state or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. § 12131(1)(A) and (B).

The ADA is clear: no qualified disabled individual shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *Noland v. Wheatley*, 835 F.Supp. 476, N.D. Indiana, 1993.

iv. [4][5] Admission to the Delaware bar is governed exclusively by this Court. In re Hudson, Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. The Board, as an instrumentality of this Court, constitutes a public entity within the meaning of Title II. See 42 U.S.C.A. § 12131(1); Supr.Ct.R. 51. Consequently, as a public entity, the Board must make reasonable accommodations to prevent the de facto exclusion "which may occur when disabled but otherwise qualified individuals are limited by standard administrative or other operating procedures from participating fully...

FN5. In D'Amico, the court pointed out that the ADA defines the term "person" as used in the examination and courses provision of Title III as having the same meaning given the term in Section 701 of the

Civil Rights Act of 1964. Id. (citing 42 U.S.C. § 12111(7)). In the Civil Rights Act, "person" is defined as including governments and governmental agencies. Id. (citing 42 U.S.C. § 2000e(a)). *In re Petition of Rubenstein*, 637 A.2d 1131, Del. 1994

10. The ruling against appellant was in error in that it was based upon an increase of State Bar attorney fee charges from $900+ to $2,700+ against appellant, and an increase of appellant's active suspension period from 3 to 5 months, in wrongful retaliation against him for asserting his right in federal court to appear at the Evidentiary Panel hearing by phone rather than in person, because of his physical disabilities under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act, under 42 U.S.C. § 1983, the federal Civil Rights Act, and under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

42 U.S.C. § 12203, Chap. 126(iv). Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Appellee did not rebut appellant's allegations and record showing as to these facts. With wrongful discrimination against appellant established as a matter of law, the ruling against him is in violation of his rights to due process and equal protection provisions of the 14th Amendment to the Constitution of the United States. In an employment setting the scenario would be:

"[2] A prima facie case creates a rebuttable presumption of intentional discrimination. *Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 283 (5th Cir.1989) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981)). To rebut this presumption the employer must articulate some legitimate, non-discriminatory reason for its action. Id. An employer may sustain this burden by introducing admissible evidence of an explanation that would be "legally sufficient to justify a judgment for the defendant." *Bohrer*, 715 F.2d at 218 (quoting *Burdine*, 450 U.S. at 255, 101 S.Ct. at 1094).

[3] If the employer articulates legitimate, non-discriminatory

reasons for its actions, the presumption created by the plaintiff's prima facie case dissolves and the burden reverts to the plaintiff to prove that the employer's reasons were pretextual. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir.1985). The plaintiff can establish pretext by introducing evidence to prove that the reason stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext" for illegal discrimination. *Elliott*, 714 F.2d at 566. The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge. Id." 41 F.2d 374, *Guthrie v. Tifco Industries*, (C.A.5 (Tex.) 1991).

11. The ruling against appellant was in error in that it was based upon the premise that the disciplinary suspension proceedings are civil in nature, when they are, inherently and as applied to the disabled appellant, quasi-criminal, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

    Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged. *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

12. The ruling against appellant was in error in that appellant was denied the opportunity to appear before the Texas Supreme Court by video teleconferencing to participate in the proceedings, as both an attorney and as a party, and to preserve the visual evidence that he is a disabled American cognizable under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act and his due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

Both appellee and appellant requested oral argument before the honorable Supreme Court, appellant to do so by live video teleconferencing under the provisions of the Americans with Disabilities Act. Appellee argued throughout this appeal that appellant had not proven his disabilities, but did not provide appellant an opportunity to appear before it by video at either Evidentiary Panel hearing. The Board of Disciplinary Appeals, in Austin, where the Supreme Court is seated, refused appellant a video hearing, only providing such a hearing after appellant filed suit therefor in federal court, and then, for the first time, was appellee and appellee's counsel able to see appellant's

paralyzed body. Yet, appellee argued before the Supreme Court thereafter that appellant did not establish his disabilities, and the Court affirmed appellee's rulings, partly based upon this appellee argument. These proceedings constitute illegal disparate treatment of, and have had an illegal disparate impact upon, appellant.

PREMISES CONSIDERED, Appellant respectfully requests rehearing in the above styled cause, reversal of the Evidentiary Panel and BODA rulings against him, and all other general and special relief, at law and in equity, to which he may be entitled.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607, by certified mail, return receipt requested, or faxed or delivered, May 28, 1996.

Respectfully submitted,

JACK SWISHER

BY: _____

Jack Swisher
3203 Chris Drive
Houston, Texas 77063
713/978-7558; fax 713/978-6342

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 2, 1996

Mr. Jack Swisher
McKeema
1445 North Loop W., Suite #110
Houston, TX 77008-1600

Ms. Christine E.
Board of Disciplinary
Appeals
P. O. Box 12426
Austin, TX 78711

Mr. Steven J. Watkins
Nathan Sommers & Woods
2302 Fannin, Suite 500
Houston, TX 77002-9816

Ms. Linda A. Acevedo
State Bar of Texas
Assistant General Counsel
P. O. Box 12487
Austin, TX 78711

Mr. James M. McCormack
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case Number 95-0779
Style: JACK G. SWISHER v. THE STATE BAR OF TEXAS

Dear Counsel:

Appellant's motion for rehearing, as amended, of appeal from the Board of Disciplinary Appeals is this day overruled. Motion for reinstatement of stay is also overruled.

Sincerely,

John T. Adams, Clerk

by _____
Elizabeth A. Saunders
Chief Duputy Clerk

THE SUPREME COURT OF TEXAS

No. 95-0779

JACK SWISHER, PETITIONER

v.

THE STATE BAR OF TEXAS, RESPONDENT

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

APPELLANT'S SECOND AMENDED MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

The honorable Supreme Court entered its decision of April 12, 1996, affirming the Board of Disciplinary Appeals' decision, suspending appellant from the practice of law for one year, with the last seven (7) months probated. Appellant respectfully requests rehearing, and that the Court give its guidance on the first impression issues presented, including those involving the Americans with Disability Act, 14th Amendment rights for disabled attorneys, the inherent and applied overly broad and unreasonably vague Disciplinary Rules affecting the 8th and 14th Amendment rights of disabled Texas attorneys, of which class appellant is a member and was injured thereby, and the inherent and applied 8th and 14th Amendment disparate impacts and treatment of the punitive measures of the Disciplinary Rules on disabled Texas attorneys, of which class appellant is a member and was injured thereby.

Records of the Evidentiary Panel hearings of June 21, 1994 and September 20, 1994 are hereinafter referred to as SF1 and SF2, respectively. Credibility of appellee's witness, Mr. Fisk, in that he contradicts appellant as to their having met, is somwhat suspect (At the September, 1994 hearing Mr. Fisk said his deposition was taken with Mr. Jama in appellant's offices [SF2-10], when appellant's testimony and the court reporter deposition exhibit before the Panel show that it was Mr. Lyons of appellant's offices, not Mr. Jama, who was present [SF2-23]).

Appellant raises federal considerations in this appeal, ones involving the 8th and 14th Amendments to the U. S. Constitution, Title 42 U.S.C. § 1983, and Title 42 U.S.C., Sec 12101, et seq, Chap. 126, Americans with Disabilities Act. All conflicts between Texas law and federal law are to be resolved in favor of the federal law in these proceedings.

We recognize that - the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.- *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975). But under the Supremacy Clause, from which our pre-emption doctrine is derived, - any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.- *Felder v. Casey*, 487 U. S., at 138 (quoting *Free v. Bland*, 369 U. S. 663, 666 (1962)); see also *De Canas v. Bica*, 424 U. S. 351, 357 (1976) (- even state regulation designed to protect vital state interests must give way to paramount federal legislation-). *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. _____ (1992).

Appellant's right to earn legal fees are property interests protected under the Constitution of the United States.

"Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). It is well settled that an interest

attains the status of "property" by virtue of the fact that it has been initially recognized and protected by federal or state rules of law. It is also well established that a mutually recognizable entitlement will receive constitutional protection. *Brown v. Ledbetter*, 569 F.Supp. 170, 172 (N.D.Ga.1983) (citations omitted)." *Bodiford v. State Of Alabama, et al.*, 854 F.Supp. 886, 1994.

Appellant's right to enjoyment of his good name and reputation are liberty interests protected under the Constitution of the United States.

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). See also *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (same with respect to "any charge ... that might seriously damage [a person's] standing and associations in his community"); *Paul v. Davis*, 424 U.S. 693, 722-723, 96 S.Ct. 1155, 1170-1171 (1976) (BRENNAN, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' ").

Also in appellant's case, because he is a severely disabled American, cognizable under the Americans with Disabilities Act, his rights to earn legal fees are inextricably intertwined with his liberty rights protected under the 14th Amendment to the Constitution of the United States.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

"As a qualitative matter, we have decided that the liberty secured by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint. Although its contours have never been defined precisely, that liberty surely includes the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place. (FN6) On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. Cf. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). At the same time, however, we have recognized that a variety of state actions have such serious effects on protected liberty

interests that they may not be undertaken arbitrarily, (FN7) or without observing procedural safeguards. (FN8)" *Albright v. Oliver*, 114 S.Ct. 1340, 127 L.Ed.2d 114, 62 USLW 4078, 1994.

More particularly, the following points of error, expressed either as such or as issues that have been presented and ruled upon by the honorable Supreme Court, make up the foundation of this motion.

POINTS OF ERROR

1. The Rules under which appellant was suspended from his practice of law, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., both inherently and as applied to appellant, have an illegal disparate impact on disabled Texas attorneys under the Americans with Disabilities Act, of which class appellant is a member, and thereby violated appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

2. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., inherently and as applied to appellant, imposed cruel and unusual punishments and excessive fines and penalties, thereby violating appellant's rights under the 8th Amendment to the Constitution of the United States.

3. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., are inherently, and as applied to appellant, so vague, indefinite, overbroad and uncertain as to violate the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

4. The ruling against appellant was in error in that it was based upon a vague and indefinite general charge, or trap within it, unrelated to specific dates, places, events, persona, materials, etc., in violation of appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

5. The ruling against appellant was in error in that it was based upon a preponderance of the evidence, under the provisions of Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendix A-1, Rules Of Disciplinary Procedure,

Part II, The District Grievance Committees, rather than upon clear and convincing proof, that appellant violated either Rule 1.01(b)(1) or Rule 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., thereby denying appellant's substantive and procedural due process and equal protection rights under the provisions of the 14th Amendment to the Constitution of the United States.

6. The ruling was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test applied to other defendants in Texas courts in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and in V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rules 5.01 and 5.03, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

7. The ruling against appellant was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test required by the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

8. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's argued positions that,

   a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eight Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

   b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints on appeal."

9. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's two argued positions that,

   a. "The Americans with Disabilities Act ("ADA") is

inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42 U.S.C.A. §12101*. None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112*. The State Bar of Texas does not fit in the definition of a "covered entity."'

10. The ruling against appellant was in error in that it was based upon an increase of State Bar attorney fee charges from $920 to $2,770 against appellant, and an increase of appellant's active suspension period from 3 to 5 months, in wrongful retaliation against him for asserting his right in federal court to appear at the Evidentiary Panel hearing by phone rather than in person, because of his physical disabilities under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act, under 42 U.S.C. § 1983, the federal Civil Rights Act, and under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

11. The ruling against appellant was in error in that it was based upon the premise that the disciplinary suspension proceedings are civil in nature, rather than quasi-criminal, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

12. The ruling against appellant was in error in that appellant was denied the opportunity to appear before the Texas Supreme Court by video teleconferencing to participate in the proceedings, as both an attorney and as a party, and to preserve the visual evidence that he is a disabled American cognizable under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act and his due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

POINTS OF ERROR RESTATED

1. The Rules under which appellant was suspended from his practice of law, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., both inherently and as applied to appellant, have an illegal disparate impact on disabled attorneys under the Americans with Disabilities Act, of which class appellant is a member, and thereby violated appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

The punishment provisions of the Disciplinary Rules, i.e., suspension from law practice, forcing severely disabled attorneys to obtain a livelihood by other means during the suspension, fall unequally and more harshly upon disabled attorneys than upon non-disabled attorneys. There is simply a much greater difficulty for severely disabled vs. non-disabled attorneys to obtain a livelihood by other means than law practice during a period of suspension. 'Suspension from practice', active and probationary, constitutes part of appellee's program governing the practice of law in Texas. Disabled attorneys, under the Americans with Disabilities Act (and under the federal Rehabilitation Act of 1973, as Texas is a grantee of federal funds), have a 14th Amendment right to share equally in that program, and not be exposed to more severe punishments under it because of their physical disabilities. The burden is on the State to take affirmative action to ensure an even playing field for the disabled through reasonable accommodation.

In construing the federal Rehabilitation Act of 1973, which has language similar to that of the Americans with Disabilities Act, the United States Supreme Court made the following observations:

"In another unanimous decision, *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that some sorts of restrictions with "disparate impact" could be actionable under the Rehabilitation Act without a showing of intentional discrimination; the Court resolved some of the ambiguities in Davis by elaborating on the extent of affirmative duties under Sec. 504:

Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.The question after *Alexander* [*v. Choate*, 469 U.S. 287,

105 S.Ct. 712, 83 L.Ed.2d 661 (1985)] is the rather mushy one of whether some "reasonable accommodation" is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the "otherwise qualified" inquiry, our precedent requires that the "reasonable accommodation" question be decided as an issue of fact--meaning, of course, that it is one for the trial court or jury, subject to "clearly erroneous" or *Boeing Co. v. Shipman* review only. See Region 13, 704 F.2d at 1409." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988)

Citing the federal Rehabilitation Act of 1973 is appropriate in that the Americans with Disabilities Act was modeled after it.

"The ADA was modeled in part after the Federal Rehabilitation Act of 1973, as amended 29 U.S.C. @@ 791 and 794(a), which forbids discrimination against individuals employed by the federal government, government contractors and recipients of federal assistance. See 1990 U.S.C.C.A.N., Legislative History P.L. 101-336 [Americans With Disabilities Act] at 337-366. Thus, cases brought under the Rehabilitation Act are instructive with respect to the ADA. *Abbasi v. Herzfeld & Rubin*, P.C., 863 F. Supp. 144, 145 n.1 (S.D.N.Y. 1994). See also *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) ("the employment provisions of the [Americans with Disabilities] Act merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors.") Indeed, the ADA's definitions of reasonable [*26] accommodation and undue hardship are "borrowed from" the regulations promulgated by the Equal Employment Opportunity Commission under the Rehabilitation Act. *Vande Zande*, 44 F.3d at 542; see 34 C.F.R. @@ 104.12(b), (c); 45 C.F.R. @@ 84.12(b), (c). Given these similarities, the paucity of case law in this Circuit on the ADA, and the etiology of the ADA, the Court of Appeals' construction of these terms in the context of the Rehabilitation Act provides substantial guidance." *Mohamed v. Marriott International*, United States District Court for the Southern District of New York, 1995 U.S. Dist. Lexis 15762.

2. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., inherently and as applied to appellant, imposed cruel and unusual punishments and excessive fines and penalties, thereby violating appellant's rights under the 8th Amendment to the Constitution of the United States.

Appellant does not ask for 'mitigation' in assessing discipline. He simply points out that what might be discipline for a non-disabled attorney would be 'cruel and unusual punishment' and constitute an 'excessive fine or penalty' for him because of his physical disabilities, discriminating against him in a manner disallowed under the Americans with Disabilities Act. That such a consideration was never made by appellee is clear, since it increased appellant's suspension from 3 to 5 months from the first hearing to the second, when the evidence warranted a reduction in the suspension, if not outright dismissal of the case. Even now appellee wrongly views the issue as one of 'mitigation'.

In its BODA appellate brief, appellee further stated:

Finally, the Eight Amendment of the U.S. Constitution regarding cruel and unusual punishment does not apply in civil cases. *Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Zwick v. Freeman, 373 F2d 110, 119 (1967); Calzarano v. Liebowitz, 550 F. Supp. 1389, 1390 (N.Y. 1982).*

Appellant plead 8th Amendment violations by appellee, which includes those of 'cruel and unusual punishment' and 'excessive fines and penalties'. In arguing that these violations do not apply in civil cases appellee is simply wrong. Appellee cites 1977 *Ingraham*, from which the dissenting opinions of Justices White, Brennan, Marshall and Stevens actually forecasted the law to come:

"We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. [FN2] The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." Ante, at 1410. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." Trop v. Dulles, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as retribution, rehabilitation, or deterrence. [FN3] Id., at 96, 78 **1421 S.Ct., at 595. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644

(1963)." *Id.* at 686.

The matter is now put to rest:

"The United States now argues that "any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted. It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). We disagree." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993)

"In Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. Id., at 665, 97 S.Ct., at 1409. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears designed to catalogue the misdeeds of James II, see ibid., rather than to define the scope of the substantive rights set out in subsequent sections." Id. at note 5.

"The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning- Ferris*, 492 U.S., at 266-267, 275, 109 S.Ct., at 2916, 2919. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, "as punishment for some offense." Id., at 265, 109 S.Ct., at 2915 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper*, 490 U.S. 435, *2806 447-448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989)" Id. at notes 3, 4.

3. The Rules under which appellant was suspended from his practice of law herein, 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., are inherently, and as applied to appellant, so vague, indefinite, overbroad and uncertain as to violate the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

In its BODA appellate brief, appellee stated:

"Substantial evidence exists to support the findings of the Evidentiary Panel that Swisher neglected Mr. Fisk's case and failed to keep him informed of its status."

This was an overbroad characterization of the *specific charges* appellee gave notice to appellant he was to defend himself against. The charges were that:

a. (Appellant) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

b. (Appellant's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

c. (Appellant) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

Rule 1.01 (b) (1), if not restricted by (c), above, would mandate, on pain of suspension, that a lawyer never commit a negligent act or omission in representing a client, i.e., that he infallibly represent clients throughout his professional career - an impossible burden.

Restricted by (c), on the other hand, the burden would be lifted, perhaps properly - if 'conscious disregard' in (c) comes under the interpretation given it in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. - Jun, 1994), and certainly if Disciplinary Rules 5.01 and 5.03 are applied (V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rules 5.01 & 5.03. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A. State Bar Rules. Article X--Discipline And Suspension Of Memberssection 9. Texas Disciplinary Rules Of Professional Conductv. Law Firms And Associations, infra).

"[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945) (plurality opinion).

If one or both of Rules 1.01 (b) (1) or 1.03 (a) were applied against Appellant, *outside the context of the three specific charged events* associated with them by appellee*, either those Rules were (*they were - see eight new charges appellee presented for first time in its closing argument, Point of Error 4 [SF2-34]):

a. unconstitutionally vague and indefinite, for lack of sufficient, indeed any, qualifying event descriptions,

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses [461 U.S. 358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, supra, 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct., at 1248. (FN7)
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> Although due process does not require "impossible standards" of clarity, see United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.
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> Our concern for minimal guidelines finds its roots as far back as our decision in United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875):
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> 'It would certainly be dangerous if the legislature could

set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.' *Kolender v. Lawson*, 461 U.S. 352, 75 L.Ed.2d 903, 1983.

or were

b. unconstitutional in their application against Appellant for lack of fair notice as to either the reach of the grievance process against him or as to what precise conduct he was charged to answer for.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

Moreover, the record shows that appellant was the owner of his firm, and therefore the supervisor of his attorney and non-attorney staff (SF2-8 [Ken Barton], 9, 10 [Mr. Jama], 13 [receptionist], 14 [his people], 23 [other lawyers...Jama...Lyons], 25 [Swisher...lawyer of record], 26 [other lawyers in the office], 28 [Mr. Jama...Lyons], 29 [under appellant direction], 31 [Mr. Ashmore]). As such, his conduct was governed by the provisions of Disciplinary Rules 5.01 and 5.03, each of which required, like *Moriel* (supra), actual knowledge of the complaint events to establish his guilt, e.g.

1. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.01. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A. State Bar Rules. Article X--Discipline And Suspension Of Memberssection 9. Texas Disciplinary Rules Of Professional Conductv. Law Firms And Associations.

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits

the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or **has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.** V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.03.

As the Comments to Rule 5.01 state:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person.

5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act.

7. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

2. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A. State Bar Rules. Article X--Discipline And Suspension Of Membersection 9. Texas Disciplinary Rules Of Professional Conductv. Law Firms And Associations.

Rule 5.03. **Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) **a lawyer having direct supervisory authority over the nonlawyer** shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) **a lawyer shall be subject to discipline for the conduct of such a person** that would be a violation

of these rules if engaged in by a lawyer if:

(1) **the lawyer orders, encourages, or permits the conduct involved; or**

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) **with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.**

The law practice of appellant and of the vast majority of Texas, indeed American, law practices, is one wherein an attorney had 'direct supervisory authority over another lawyer and/or nonlawyer' ("Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals." Comment 1, Rule 5.03). Since appellant had such authority, and the complaint events involved conduct of his lawyer and/or nonlawyer staff, Rules 5.01 and/or 5.03 either:

a. circumscribe Rules 1.01 (b) (1) and 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., under which appellant was suspended from his practice of law herein, requiring appellant's knowledge of the complaint events for his conviction,

The uncontroverted record shows appellant had no such knowledge (SF2-23, 24, 31, 33). However, appellee's position is that such knowledge by appellant is unnecessary to convict appellant of the charged events (SF2-24, _____). Rule 1.01 has a 'knowledge' requirement, e.g.

(c) As used in this Rule, "neglect" signifies **inattentiveness involving a conscious disregard** for the responsibilities owed to a client or clients.

Rule 1.03 (a) does not mention a 'knowledge' requirement.

Point: If Rules 5.01 and/or 5.03 circumscribe Rules 1.01 (b) (1) and 1.03 (a), appellant is either not guilty as charged (his lack of 'knowledge' was uncontroverted (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection for lack of application of Rules 5.01 and/or 5.03 to the facts in his case.

b. or, must be applied in context with Rules 1.01 (b) (1) and 1.03 (a),

The facts of the case clearly come within the purview of Rules 5.01 and/or 5.03, as other lawyer and nonlawyer staff were shown to have been working for appellant during the complaint events period (SF2-8 [Ken Barton], 9, 10 [Mr. Jama], 13 [receptionist], 14 [his people], 23 [other lawyers...Jama...Lyons], 25 [Swisher...lawyer of record], 26 [other lawyers in the office], 28 [Mr. Jama...Lyons], 29 [under appellant direction], 31 [Mr. Ashmore]).

Point: If Rules 5.01 and/or 5.03 must be applied in context with Rules 1.01 (b) (1) and 1.03 (a), appellant is either not guilty as charged (his lack of 'knowledge' was uncontroverted (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection for lack of application of Rules 5.01 and/or 5.03 to the facts in his case.

c. or, are reasonably susceptible to interpretation as meant to either circumscribe or be applied in context with Rules 5.01 and/or 5.03,

The facts of the case clearly come within the purview of Rules 5.01 and/or 5.03 (SF2-8 [Ken Barton], 9, 10 [Mr. Jama], 13 [receptionist], 14 [his people], 23 [other lawyers...Jama...Lyons], 25 [Swisher...lawyer of record], 26 [other lawyers in the office], 28 [Mr. Jama...Lyons], 29 [under appellant direction], 31 [Mr. Ashmore]).

Point: If Rules 5.01 and/or 5.03 are reasonably susceptible of interpretation that they are meant to either circumscribe or be applied in context with Rules 1.01 (b) (1) and 1.03 (a), appellant is either not guilty as charged (his lack of 'knowledge' was uncontroverted (SF2-23, 24, 31, 33)), or he was denied 14th Amendment due process and equal protection in that:

i. Rules 1.01 (b) (1) and 1.03 (a) are unconstitutionally vague as to the 'knowledge' requirement,

ii. Rules 5.01 and/or 5.03 are unconstitutionally vague as to the 'knowledge' requirement, or

iii. Rules 1.01 (b) (1), 1.03 (a), 5.01 and/or 5.03, taken in combination, are unconstitutionally vague as to the 'knowledge' requirement

d. or, none of the above.

Point: If Rules 1.01 (b) (1) and 1.03 (a) stand alone, escaping inclusion of Rules 5.01 and/or 5.03, appellant was denied 14th Amendment due process and equal protection in that:

i. Rules 1.01 (b) (1) and 1.03 (a) are unconstitutionally overbroad for lack of the 'knowledge' requirement, and imposed an impossible and unreasonable burden upon appellant (he could not communicate information about events which had occurred when he had no knowledge that they had occurred).

e. In any event, appellee asserted, on the record, that suspension was assessed against appellant for **knowingly** violating Rules 1.01 (b) (1) and 1.03 (a) [SF1-18 & 19, and SF2-35, respectively, as follows]:

MR. SANCHEZ: Can you give me those violations again, please?
MS. MOORE: Sure. 1.01(b)1 and 1.03(a). We're seeking a suspension

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in this case, and I believe in your notebooks in front of you, you have the ABA standards for imposing lawyer sanction. 4.04, regarding lack of diligence, states that suspension is

generally appropriate when a lawyer knowingly fails to perform services for a client that causes injury or potential injury to a client.

MS. MOORE: I'd like to direct the Committee's attention to the American Bar Association's standard for imposing lawyer sanctions, specifically Section 4.4 which states that "a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client."

4. The ruling against appellant was in error in that it was based upon a vague and indefinite general charge, or trap within it, unrelated to specific dates, places, events, persona, materials, etc., unmentioned in the *specific* charges against appellant, in violation of appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

The charges were that:

a. (Appellant) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

b. (Appellant's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

c. (Appellant) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

Appellant successfully made his defense to the *specific* charges against him. Appellee did not controvert that defense with any evidence. Moreover, appellee, on closing argument, abandoned its own *specific* charges ("In closing, the failure to file the status report was not an isolated error or omission. [SF2-34]), and delved into the following eight (8) general charges - against not one of which did it give appellant any prior notice he had to defend himself [SF2-34 & 35]:

The evidence clearly establishes a pattern of neglect. It shows a **conscious disregard** for the duties owed to Mr. Fisk. First of all, as was earlier testified to, there was no response ever filed to the doctor's motion for summary judgment.[1] An expert witness was never designated.[2] Depositions were never taken.[3] Even after Mr. Swisher's motion to extend time to answer to the motion for summary judgment was granted, there was still no response filed.[4] Mr. Swisher failed to take it upon himself to determine when a response date was due.[5] Mr. Swisher failed to contact

Mr. Fisk at all during this whole case.[6] He failed to return even one of Mr. Fisk's several phone calls throughout the year.[7] Even after learning of the dismissal, Mr. Swisher failed to contact Mr. Fisk to try to offer any explanation, to try to file a bill of review, to try to save the case in any way.[8] All of the above, again, establishes neglect on the Respondent's part.

1. "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

2. Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged. *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

3. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is

doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). See also *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (same with respect to "any charge ... that might seriously damage [a person's] standing and associations in his community"); *Paul v. Davis*, 424 U.S. 693, 722-723, 96 S.Ct. 1155, 1170-1171 (1976) (BRENNAN, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' ").

5. The ruling against appellant was in error in that it was based upon a preponderance of the evidence, under the provisions of Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendix A-1, Rules Of Disciplinary Procedure, Part II, The District Grievance Committees, or V.T.C.A., Govt. Code T. 2, Subt. G App. A, St Bar Rules, Art. 10, Sec. 16, rather than upon clear and convincing proof, that appellant violated either Rule 1.01 (b) (1) or Rule 1.03 (a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A., thereby denying appellant's due process and equal protection rights under the provisions of the 14th Amendment to the Constitution of the United States. Those Rules are:

   a. V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.16. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A-1. Rules Of Disciplinary Procedure. Part Ii. The District Grievance Committees.

      2.16. Evidentiary Hearings

      If the investigatory panel of the Committee finds Just Cause and if the Respondent fails to elect to have the Complaint tried in the district court, the matter may be transferred, if necessary, in accordance with the venue provisions of these rules. The chair of the Committee to which the matter is transferred shall appoint an evidentiary panel to conduct an evidentiary hearing, to make findings of fact and conclusions of law, and either to dismiss the Complaint or to impose Sanctions... Proceedings before an evidentiary panel of the Committee include:

A. Service upon the Respondent of a **written statement of the specific charge or charges** against the Respondent, together with a copy of the Complaint. **The charge shall** be formulated by the evidentiary panel on the basis of the findings of the investigatory panel...At the time of service upon the Respondent, the Chief Disciplinary Counsel shall also file with the Committee and serve upon the Respondent a proposed hearing order **contain** ing at least the following:

1. A list, including names, addresses, and telephone numbers of all witnesses expected to be called to testify before the panel in person or by deposition.

2. A **written** summary of the **issues of fact expected to be contested.**

I. **The burden** of proof is upon the Complainant and the Chief Disciplinary Counsel **to prove the material allegations of the charge** by a preponderance of the evidence.

M. Written findings of fact, conclusions of law, and any Sanctions shall be issued by the evidentiary panel within thirty days after the conclusion of the evidentiary hearing.

There were no fact findings of fact, nor conclusions of law, that appellant *knowingly*:

a. failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

c. failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

b. Section 16. Additional Rules of Procedure

(A) Nature of Proceedings. Disciplinary actions are civil in nature.

(B) Proceedings Governed by Rules of Civil Procedure. Except as otherwise provided in these rules, the Texas Rules of Civil Procedure apply in disciplinary actions.

(C) Standard of Proof. Disciplinary actions shall be proven by a preponderance of the evidence.

"FN9. **In attorney suspension** and disbarment **cases, the charges must be sustained by clear and convincing proof.** *In re Fisher*, 179 F.2d 361, 369 (7th Cir.), cert.

denied sub nom. *Kerner v. Fisher*, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950); *In re Ryder*, 263 F.Supp. 360, 361 (E.D.Va.), aff'd 381 F.2d 713 (4th Cir.1967) (adopting the district court's opinion).

6. The ruling was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test applied to other defendants in Texas courts in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and in V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rules 5.01 and 5.03, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States. (See Point 3, supra, re Rules 5.01 and 5.03).

"Although the multiple grounds of recovery in bad faith lawsuits might seem to complicate the gross negligence issue, the proper analysis is relatively simple--gross negligence in the context of insurance is no different from gross negligence in any other context.

(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

The requirement of conscious indifference, which our law requires, is superfluous unless it requires proof that the defendant had actual subjective knowledge of an extreme risk of serious harm." *Moriel*, Id.

7. The ruling against appellant was in error in that it was based upon a finding of either 'gross negligence' or 'conscious indifference', wherein appellant was denied the subjective awareness test required by the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

Appellee singled out appellant in applying either a negligence standard, or a gross negligence standard based upon a single-prong objective test, in levying its attorney fee and suspension fine/penalty/punishment against appellant. This violated appellant's 14th Amendment due process and equal protection rights because a subjective test for gross negligence must be met before appellant may be punished by such fines, penalties, punishment, loss of property and liberty rights, and punitive damage awards (*Transportation Ins. Co. v. Moriel*,

879 S.W.2d 10 (Tex. - Jun, 1994)).

"A prison official's -deliberate indifference- to a substantial risk of serious harm to an inmate violates the Eighth Amendment. See *Helling v. McKinney* 509 U. S. __ (1993); *Wilson v. Seiter*, 501 U. S. 294 (1991); *Estelle v. Gamble*, 429 U. S. 97 (1976). This case requires us to define the term -deliberate indifference,- as we do by requiring a showing that the official was subjectively aware of the risk." *Farmer v. Brennan, Warden, et al*, U.S.Sup.Ct. [June 6, 1994].

"FN10. In addition to ensuring fair notice, vagueness doctrine also guards against " 'harsh and discriminatory enforcement ... against particular groups deemed to merit [official] displeasure.' " *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110 (1972) (citation omitted); see also Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983). Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction. See, e.g., Comment, Controlling Lawyers by Bar Associations and Courts, 5 Harv.Civ.Rights-Civ.Lib.L.Rev. 301, 312-314 (1970); Comment, The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: What Ever Happened to Spevak?, 23 Vill.L.J. 127, 135-136 (1977). See also n. 11, infra." 105 S.Ct. 2265, 471 U.S. 626, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, (U.S.Ohio 1985)

8. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's argued positions that,

   a. "Swisher contends that the Evidentiary Panel erred in assessing discipline without considering his disabilities and thereby violated: 1) the Americans with Disabilities Act; 2) *Title 42 §1983* (civil rights); and, 3) the Eight Amendment of the United States Constitution (cruel and unusual punishment). Swisher raised none of these arguments as defenses during the proceedings.", and

   b. "He presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints on appeal." (Untrue. The following testimony is in the record (SF2-33)):

Mr. Swisher, have you been able to hear us?
MR. SWISHER: Yes.
MR. HOWARD: Okay. All right. Are you appearing at this hearing by telephone at your own request under the American Disabilities Act?
MR. SWISHER: Yes, I am.

Appellant could not have raised these arguments during the proceedings because no discipline was assessed during them. When he received notice of the assessed discipline, appellant timely appealed and therein presented the contentions mentioned.

Also, this action is that of the State of Texas, through its agency the State Bar, against appellant, a disabled American citizen under the Americans with Disabilities Act. The State of Texas has been on notice for years that Appellant is severely disabled:

1. It paid his college tuition at the University of Houston in the 1960's because of them.
2. It refunded the taxes on the purchase of his car in 1977 because of them.
3. It provided him a handicapped drivers license because of them (stamping the handicapped code on his drivers license every 3 years since 1976).
4. When sworn in as a new attorney by Judge Wilmer Hunt, 133rd District Court, Harris County, Texas in 1966, in open court before a jury an counsel, interrupting a trial, appellant testified as to his disabilities on explaining that he could not raise his right hand to take the oath his licensure required.
5. When sworn in by the Grievance Committee on some half-dozen prior occasions over the years, 4 or 5 of those video recorded, he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.
6. When sworn in by the Evidentiary Panel in these proceedings he testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.

7. Appellant's disabilities constituted the foundation of his sworn federal court injunction hearing at which three attorneys from the State Bar were present, and as a result of which the Bar granted appellant the right to appear at its second Evidentiary Panel hearing by telephone because he was a disabled American under the A.D.A. The Bar would not have allowed his phone appearance for any other reason. It is from that hearing this appeal was taken.

8. In registering for the draft with the United States at age 18 he was acknowledged by our federal government as being so physically impaired he was unfit for service.

9. More simply, evidence regarding appellant's disabilities comes from appellee's own witness, e.g., in its First Reply Point appellee recites:

'Mr. Fisk described Swisher by saying "his arms are rather distinctive, like they're paralyzed or something." (S.F. II. 11).'

10. And the record mentions it (SF2-33):

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17        Mr. Swisher, have you been
   able to
18 hear us?
19      MR. SWISHER:  Yes.
20         MR. HOWARD:  Okay.  All
   right.
21 Are you appearing at this hearing
   by
22  telephone at your own request
   under
23 the American Disabilities Act?
24      MR. SWISHER:  Yes, I am.
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9. In violation of appellant's rights under the Americans with Disabilities Act and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, the ruling against appellant was in error in that it was based upon appellee's two argued positions that,

a. "The Americans with Disabilities Act ("ADA") is inapplicable in lawyer discipline proceedings. The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *Title 42*

U.S.C.A. §12101. None of these areas encompass the conduct of an agency carrying out its statutory duties and performing its regulatory functions.", and

b. 'In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *Title 42 U.S.C.A. §12112*. The State Bar of Texas does not fit in the definition of a "covered entity.'"

Appellee cited no case authority for these positions, making reference only to *Title 42 U.S.C.A. §12101 and 12112* of the Americans with Disabilities Act. Appellant cited the following authority which controverts appellee's argued positions:

i. "As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993.

ii. Title II of the ADA, 42 U.S.C. § 12131 et seq., which is the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132." *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284.

iii. ADA Sections 12131 through 12134, 42 U.S.C. § 12131-12134, prohibit discrimination in public services... The ADA, 42 U.S.C. § 12101 et seq., provides: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. 42 U.S.C. § 12131(1) defines "public entity" to include any state or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local

government. 42 U.S.C. § 12131(1)(A) and (B).

The ADA is clear: no qualified disabled individual shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *Noland v. Wheatley*, 835 F.Supp. 476, N.D. Indiana, 1993.

iv. [4][5] Admission to the Delaware bar is governed exclusively by this Court. In re Hudson, Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. The Board, as an instrumentality of this Court, constitutes a public entity within the meaning of Title II. See 42 U.S.C.A. § 12131(1); Supr.Ct.R. 51. Consequently, as a public entity, the Board must make reasonable accommodations to prevent the de facto exclusion "which may occur when disabled but otherwise qualified individuals are limited by standard administrative or other operating procedures from participating fully...

FN5. In D'Amico, the court pointed out that the ADA defines the term "person" as used in the examination and courses provision of Title III as having the same meaning given the term in Section 701 of the Civil Rights Act of 1964. Id. (citing 42 U.S.C. § 12111(7)). In the Civil Rights Act, "person" is defined as including governments and governmental agencies. Id. (citing 42 U.S.C. § 2000e(a)). *In re Petition of Rubenstein*, 637 A.2d 1131, Del. 1994

10. The ruling against appellant was in error in that it was based upon an increase of State Bar attorney fee charges from $920 (SF1-21) to $2,770 (SF2-20) against appellant, and an increase of appellant's active suspension period from 3 to 5 months, in wrongful retaliation against him for asserting his right in federal court to appear at the Evidentiary Panel hearing by phone rather than in person, because of his physical disabilities under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act, under 42 U.S.C. § 1983, the federal Civil Rights Act, and under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States.

Appellee injected eight new charges into its closing argument at the second Panel hearing of September, 1996 (supra), none of which had it presented to appellant in the charges he had been called to defend himself against, though appellee was

required to present such matters to appellant under its own Disciplinary Rules, and under the 14th Amendment to the Constitution of the United States.

42 U.S.C. § 12203, Chap. 126(iv). Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Appellee did not rebut appellant's allegations and record showing as to these facts. With wrongful discrimination against appellant established as a matter of law, the ruling against him is in violation of his rights to due process and equal protection under the provisions of the 14th Amendment to the Constitution of the United States.

In an employment setting the scenario would be:

"[2] A prima facie case creates a rebuttable presumption of intentional discrimination. *Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 283 (5th Cir.1989) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981)). To rebut this presumption the employer must articulate some legitimate, non-discriminatory reason for its action. Id. An employer may sustain this burden by introducing admissible evidence of an explanation that would be "legally sufficient to justify a judgment for the defendant." *Bohrer*, 715 F.2d at 218 (quoting *Burdine*, 450 U.S. at 255, 101 S.Ct. at 1094).

[3] If the employer articulates legitimate, non-discriminatory reasons for its actions, the presumption created by the plaintiff's prima facie case dissolves and the burden reverts to the plaintiff to prove that the employer's reasons were pretextual. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir.1985). The plaintiff can establish pretext by introducing evidence to prove that the reason stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext" for illegal discrimination. *Elliott*, 714 F.2d at 566. The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge. Id." 41 F.2d 374, *Guthrie v. Tifco Industries*, (C.A.5 (Tex.) 1991).

11. The ruling against appellant was in error in that it was based upon the premise that the disciplinary suspension proceedings are civil in nature, when they are, inherently and as applied to the disabled appellant, quasi-criminal, thereby violating Appellant's due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

Imposition of sanctions is made under the following Rule:

V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.17. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A-1. Rules Of Disciplinary Procedure. Part Ii. The District Grievance Committees.

2.17. Imposition of Sanctions

In imposing any Sanctions, the evidentiary panel shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned.

B. The seriousness of and circumstances surrounding the Professional Misconduct.

C. The loss or damage to clients.

D. The damage to the profession.

E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found.

F. The profit to the attorney.

G. The avoidance of repetition.

H. The deterrent effect on others.

I. The maintenance of respect for the legal profession.

J. The conduct of the Respondent during the course of the Committee action.

"(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop v. Dulles*, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). **The relevant inquiry is** not whether the offense for which a punishment is inflicted has been labeled as criminal, but **whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as** retribution, rehabilitation, or **deterrence.** [FN3] Id., at 96, 78 **1421

S.Ct., at 595. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)." *Id.* at 686.

"We said in Halper that "**a civil sanction that** cannot fairly be said solely to serve a remedial purpose, but rather **can only be explained as also serving** either retributive or **deterrent purposes, is punishment**, as we have come to understand the term." 490 U.S., at 448, 109 S.Ct., at 1902." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

More recently, we have noted that forfeiture serves "punitive and **deterrent purposes**," Calero-Toledo, 416 U.S., at 686, 94 S.Ct., at 2093, and "impos [es] an economic penalty," id., at 687, 94 S.Ct., at 2094. **We conclude, therefore, that forfeiture** generally and statutory in rem forfeiture in particular **historically have been understood, at least in part, as punishment.** [FN12]. *Austin*, Id.

Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged. *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

12. The ruling against appellant was in error in that appellant was denied the opportunity to appear before the Texas Supreme Court by video teleconferencing to participate in the proceedings, as both an attorney and as a party, and to preserve the visual evidence that he is a disabled American cognizable under the Americans with Disabilities Act, thereby violating Appellant's rights under the Americans with Disabilities Act ("'ADA") and his due process and equal protection rights under the 14th Amendment to the Constitution of the United States.

Both appellee and appellant requested oral argument, as permitted under the Disciplinary Rules, before the honorable Supreme Court, appellant to do so by live video teleconferencing under the provisions of the Americans with Disabilities Act. Appellee argued throughout this appeal that appellant had not proven his disabilities, but did not provide appellant an opportunity to appear before it by video at either Evidentiary Panel hearing. The Board of Disciplinary Appeals, in Austin, where the Supreme Court is seated, refused appellant a video hearing, only providing one after appellant filed suit therefor in federal court. As a result, for the first time, appellee and appellee's counsel were able to see appellant's paralyzed body. Yet, appellee argued before the honorable Supreme Court thereafter that

appellant had not established his physical disabilities, and the Court affirmed appellee's rulings, partly based upon this appellee argument. These proceedings constitute illegal disparate treatment of, and have had an illegal disparate impact upon, appellant. Rather than take the legally required ADA affirmative action to accommodate appellant, to remove the surmountable barriers to his participation in these government proceedings against his property and liberty interests, the State of Texas has once again denied appellant that participation.

13. The Rule of Disciplinary Procedure denying appellant's stay of suspension pending appeal is inherently, and in its application against appellant, as it denies them their substantive and procedural rights to equal protection and due process under the 14th Amendment to the United States Constitution.

Appellee presented no charge, and no evidence, to appellant, nor does the Rule require it, setting out a basis for its determination that appellant's continued practice of law, under stay of suspension pending appeal, posed a continuing threat to the welfare of his clients or to the public. Appellant therefore had no fair and timely notice as to what he was to defend himself against in order to obtain a stay of his suspension pending appeal. Such a stay is mandatory under the Disciplinary Rules (V.T.C.A., Govt. Code T. 2, Subt. G App. A, St Bar Rules, Art. 10, Sec. 22; V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.21

B. An order of suspension must be stayed during the pendency of any appeals therefrom if the evidentiary panel finds, upon competent evidence, that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public. An evidentiary panel may condition its stay upon reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, or it may impose a requirement of an affirmative act such as an audit of a Respondent's client trust account.), short of a showing that appellant's continued practice of law constitutes a danger to his clients and/or to the public.

"It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact (*Vanderhoof v. People of State of Colorado*, 152 Colo. 147, 149, 380 P.2d 903, 904) that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed [386 U.S. 609] not so much as retribution as it is

to keep individuals from inflicting future harm. (FN1) *United States v. Brown*, 381 U.S. 437, 458, 85 S.Ct. 1707, 1720, 14 L.Ed.2d 484.

The Court of Appeals for the Third Circuit in speaking of a comparable Pennsylvania statute (FN2) said:

'It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those [386 U.S. 610] safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.' *United States ex rel. Gerchman v. Maroney*, 3 Cir., 355 F.2d 302, 312.

[5] We agree with that view. Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' (*Graham v. State of West Virginia*, 224 U.S. 616, 625, 32 S.Ct. 583, 56 L.Ed. 917) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' *Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 504, 7 L.Ed.2d 446; *Chandler v. Fretag*, 348 U.S. 3, 8, 75 S.Ct. 1, 99 L.Ed. 4. Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. * * * None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act. We therefore hold that it is deficient in due process as measured by the requirements of the Fourteenth Amendment. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923." *Specht v. Patterson*, 87 S.Ct. 1209, 386 U.S. 605 (U.S.Colo. 1967).

PREMISES CONSIDERED, Appellant respectfully requests

rehearing in the above styled cause, reversal of the Evidentiary Panel and BODA rulings against him, and all other general and special relief, at law and in equity, to which he may be entitled.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607, by certified mail, return receipt requested, or faxed or delivered, May 28, 1996.

Respectfully submitted,

JACK SWISHER

BY: _____

Jack Swisher
3203 Chris Drive
Houston, Texas 77063
713/978-7558; fax 713/978-6342

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 2, 1996

Mr. Jack Swisher
McKeema
1445 North Loop W., Suite #110
Appeals
Houston, TX 77008-1600

Ms. Christine E.

Board of Disciplinary

P. O. Box 12426
Austin, TX 78711

Mr. Steven J. Watkins
Nathan Sommers & Woods
2302 Fannin, Suite 500
Houston, TX 77002-9816

Ms. Linda A. Acevedo
State Bar of Texas
Assistant General Counsel
P. O. Box 12487
Austin, TX 78711

Mr. James M. McCormack
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case Number 95-0779
Style: JACK G. SWISHER v. THE STATE BAR OF TEXAS

Dear Counsel:

The second motion for rehearing of appeal from the Board of Disciplinary Appeals in this case was received and referred to the Court.

There being no provision in the Texas Rules of Appellate Procedure for a second motion for rehearing, the Court has instructed that same be returned to appellant.

Sincerely,

John T. Adams, Clerk

by _____
Elizabeth A. Saunders
Chief Duputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK SWISHER, Plaintiff)

VS.) CIVIL ACTION NO. H-94-2653

STATE BAR OF TEXAS, Defendant)

PLAINTIFF'S ORIGINAL PETITION FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jack Swisher, hereinafter called Plaintiff, complaining of the State Bar of Texas, hereinafter called Defendant, and for cause of action would show the Court as follows:

PARTIES

1. On the occasions made the basis of this suit Plaintiff resided in Harris County, Texas, and was and is one of a class of duly licensed practicing attorneys in good standing with the State Bar of Texas, as hereinafter qualified. Also, Plaintiff was at all material times an American individual with physical disabilities that substantially limited one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment. He was and is one of a class of individuals protected by the provisions of Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C.

Defendant, State Bar of Texas, was at all material times a government agency of the State of Texas doing business as such in and under the laws of the State of Texas may be served with process by execution on its agent for service, Dan Morales, the Attorney General for the State of Texas, 209 West 14th Street at Lavaca, Suite 800, Austin, Travis County, Texas.

JURISDICTION.

2. This is a petition for injunctive relief against Defendant, State Bar of Texas, under the provisions of the 14th Amendment of the United State Constitution, and 42 United States Code, Secs. 1983, 1985 and 1985(3), and under Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C.

The State Bar of Texas, acting under color of the Texas Government Code, Title 2. Judicial Branch, Title 2, Subtitle G--Appendix, A-1. Rules of Disciplinary Procedure, Part II, V.T.S.C.A., i.e., with knowledge of and pursuant to them, subjected or caused the Plaintiff, a citizen of the United States, to be subjected to deprivation of his rights, privileges, immunities and property, without due process of law and equal protection of the laws, secured by the Constitution and laws of the United States of America, including the 14th Amendment to the Constitution of the United States, presenting plaintiff with communication barriers to notice and hearing in the process in violation ofTitle 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C., and is therefore liable to Plaintiff, who is the party injured herein and who brings this suit for redress at law and in equity.

STATEMENT OF FACTS.

3. Plaintiff was not present at the evidentiary panel hearing because he thought it was to occur a week later than it did, per verbal information from his para-legal a few days prior to the hearing. However, while the hearing was underway, from his voice mail plaintiff immediately returned the panel's phone call in less than 30 minutes. Plaintiff told the panel over the phone that he thought the hearing was to occur a week later, and that he could not at the moment get dressed and appear

because his arms were permanently paralyzed in the 1952 Houston polio epidemic, and there was no one to help him get to the hearing. The panel officer said he would call back, after consulting with the rest of the panel about this information, and did so within a few minutes. He told plaintiff that the hearing would go on anyway, without plaintiff's appearance, even by phone (*under similar circumstances the Texas Workers' Compensation Commission allows plaintiff to appear at its hearings by phone, per enclosures herewith).

Since plaintiff's reliance upon his paralegal's erroneous information, and his non-appearance, were both caused by his physical impairment, the evidentiary panel hearing occurred without his being able to defend himself. The conduct of the proceedings under these circumstances presented plaintiff with a communication barrier of a kind meant to be removed by Title 42, § 12101, et seq, Chap. 126, Americans With Disabilities Act, U.S.C. The deposition evidence presented against plaintiff at the hearing, presented to plaintiff for the first time August 1, 1994, with exhibits, is attached.

Contrary to Mr. Fisk's testimony before the panel, plaintiff was not present on either the occasion of Mr. Fisk's deposition or answering of interrogatories (*a copy of the deposition is being obtained to show the court reporter's recitation as to who was present).

On July 27, 1994, plaintiff filed a Notice of Appeal[1] of the decision of defendant's Houston, Texas Evidentiary Panel rendered July 9, 1994 in the matter of HO-0029302513 / Johnny J. Fisk - Jack G Swisher, Jr. (*per § 2.2, Subtitle G A-1, Texas Rules of Disciplinary Procedure, Texas Government Code, V.A.T.S.). Plaintiff's Notice of Appeal was faxed to

defendant at its main offices in Houston and Austin, Texas within the 30-day time period set out in Part II, 21.A.

[1]A copy of plaintiff's Notice of Appeal is attached, incorporated by reference, and made a part hereof for all material purposes).

After July 20, 1994, at the earliest, and on July 29, 1994, plaintiff found that a stay of his suspension pending appeal had been ruled upon by the Evidentiary Panel on the issue as to whether or not his continued practice of law posed a continuing threat to the welfare of his clients or to the public (*per § 2.2, Subtitle G A-1, 21.A & B, and 14.02, Texas Rules of Disciplinary Procedure, Texas Government Code, V.A.T.S.), and that the Panel had ruled against the stay without giving plaintiff notice or hearing to present evidence in defense against this new issue. These issues had not been mentioned by either the Panel or the law as ones against which plaintiff had to defend himself at the Evidentiary Panel hearing of July 9, 1994.[2]

[2]A copy of the Evidentiary Panel documentation given plaintiff for that hearing, including notice of the two issues that would be ruled upon, is attached, incorporated by reference, and made a part hereof for all material purposes.

CAUSE OF ACTION

Prohibitive Injunctive Relief

5. If an injunction is not granted, Plaintiff will be irreparably harmed because:

A. On July 28, 1994, plaintiff requested defendant's Evidentiary Panel to stay its suspension order pending plaintiff's appeal. However, the Panel has not ruled on that request, nor convened to do so. Moreover, it is not

required by law to do so, nor is there a legal method by which it can be determined that it will do so.

B. Plaintiff will be unable to process cases that he has been working on exclusively, and which other attorneys in his office are not, and cannot timely be, prepared to handle, against which there are statutes of limitation, docket control orders, and trial settings which will fail to be met (*to the detriment of many seriously injured clients of plaintiff); and

C. Plaintiff will not be able to prevent, and recover from, the unfairly engendered suspicion and mistrust of him in the minds of his clients, peers, and others, to be spread by them into the minds of a larger general public, all as part of his having to return the files to hundreds of his clients for three months because the stay was not allowed[3], with the misleading and untrue explanation to them that he has been suspended from the practice of law for that period of time because he was found to have knowingly and consciously disregarded a client's interests, though by default and contrary to the truth given in writing by him to the Evidentiary Panel, which was part of the Panel's file for consideration at the referenced July 9, 1994 hearing.

([3]21.B recites that, "An order of suspension must be stayed during the pendency of any appeals therefrom if the evidentiary panel finds, upon competent evidence, that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public." 14.02 recites that, "The Chief Disciplinary Counsel has the burden to prove the case for an interim suspension by a preponderance of the evidence." Copies of both Rules are attached, incorporated by reference, and made a part hereof for all material purposes.)

6. Plaintiff has no adequate remedy at law against the defendant because of the Constitutional 11th Amendment immunity therefrom enjoyed by defendant. Also, plaintiff has to return his clients' files by August 5, 1994, leaving too little time for effective legal relief.
7. The issuance of mandatory and prohibitive temporary injunction herein will not cause undue inconvenience or loss to the defendant, but will prevent irreparable injury to Plaintiff. Also, plaintiff's continued practice of law does not pose a continuing threat to the welfare of his clients or to the public.

Supporting this latter representation, plaintiff has worked within the system to effectuate the provisions of the Texas Workers' Compensation Act of 1991, when the rest of the plaintiff bar withdrew from the field. In open federal court the Texas Attorney General's office admitted that plaintiff processes more workers compensation cases than any other attorney in Texas. Plaintiff's firm wins the vast majority of the hearings for his clients at all three TWCC levels, from the Benefits Review Conference, to the Contested Case Hearing, and the Appeals Panel.

Through the Americans with Disabilities Act plaintiff has been able to secure Workers Compensation Commission approval for physically impaired attorneys to appear at hearings accross Texas by phone, including plaintiff and a Dallas attorney who is paralyzed from the neck down and practices law from an iron lung. Plaintiff had polio in 1952, suffering permanent paralysis of both of his arms, and of two-thirds of his breathing strength, the latter forcing his reliance upon iron lungs and respirators in which to sleep at night for the past 42 years.

Plaintiff has been in practice since 1966 and never been

disbarred, suspended, or reprimanded, having successfully represented thousands of clients during that time.

8. Plaintiff is likely to succeed on the merits in a trial of this claim. For example, the two grievances made against him were:

> Rule 1.01 (b) (1) ... a lawyer shall not ... (1) neglect a legal matter entrusted to the lawyer;
>
> (c) As used in this Rule, "neglect" signifies inattentiveness involving a **conscious disregard** for the responsibilities owed to a client ...
>
> Rule 1.03 (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [*(b) and Comments 1 through 5 indicate issues regarding a lawyer's **knowingly** withholding information from a client.]

Plaintiff's truthful response in writing to the Panel for the hearing was preserved on appeal as follows:

> There is either no evidence, or an insufficiency of evidence, to support the panel's decision that (Plaintiff) *consciously disregard* or *knowingly* withheld information concerning Mr. Fisk's dismissal notice and order. The file was handled by two other experienced personal injury attorneys in his law firm on a day to day basis, through which process they discussed the matter with appellant from time to time. (Plaintiff) was not aware of the pending and transpired dismissal events, and would have reacted appropriately with motions to retain and/or reinstate had he known.

9. Due to all of the above, Plaintiff requests this Court to enter a mandatory temporary injunction, enjoining the defendant, its agents, servants, employees, attorneys, and all persons from:

   A. Suspending plaintiff's practice of law pending his appeal from the Evidentiary Panel decision of July 9, 1994 in the matter of HO-0029302513 / Johnny J. Fisk - Jack G Swisher, Jr., or

   B. Until such time as the Evidentiary Panel finds, upon

competent evidence, after reasonable notice and hearing given plaintiff to prepare and defend himself on the issue, that plaintiff's continued practice of law does not pose a continuing threat to the welfare of plaintiff's clients or to the public.

WHEREFORE, Plaintiff requests that:

1. The Court enter a mandatory temporary injunction compelling the defendant, its agents, servants, employees, attorneys, and all persons in participation with defendant, to refrain from:
   A. Suspending plaintiff's practice of law pending his appeal from the Evidentiary Panel decision of July 9, 1994 in the matter of HO-0029302513 / Johnny J. Fisk - Jack G Swisher, Jr., or
   B. Until such time as the Evidentiary Panel finds, upon competent evidence, after reasonable notice and hearing given plaintiff to prepare and defend himself on the issue, that plaintiff's continued practice of law does not pose a continuing threat to the welfare of plaintiff's clients or to the public.
2. Plaintiff be awarded reasonable attorney's fees and court costs.
3. All other remedies to which Plaintiff may be entitled at law and in equity.

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____

Jack Swisher
Attorney at Law
TBA #19589000
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned Notary Public, on this day personally appeared JACK SWISHER, who, being by me duly sworn on oath deposed and said that he is the Plaintiff in the above-entitled and numbered cause; that he has read the above and foregoing Plaintiff's Original Petition for Injunctive Relief; and that every statement contained therein is within his personal knowledge and is true and correct.

_____

JACK SWISHER

SUBSCRIBED AND SWORN TO BEFORE ME on this _____, 19_____, to certify which witness my hand and seal of office.

My Commission Expires:

_____ _____

Notary Public, State of Texas

LIST OF EXHIBITS

1. § 2.2, Subtitle G A-1, 21.A & B, and 14.02, Texas Rules of Disciplinary Procedure, Texas Government Code, V.A.T.S.

2. Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C.

3. Evidentiary Panel documentation given plaintiff in advance of its hearing July 9, 1994, including notice of the only two issues that would be ruled upon.

4. Plaintiff's written response to the charges against him by John Fisk for the Evidentiary Panel hearing of July 9, 1994.

5. Deposition evidence presented against plaintiff at the Evidentiary Panel hearing, presented to plaintiff for the first time August 1, 1994, with exhibits.

6. Evidentiary Panel Findings of Fact and Conclusions of Law, July 9, 1994.

7. Plaintiff Notice of Appeal of decision of Evidentiary Panel rendered July 9, 1994 in the matter of HO-0029302513 / Johnny J. Fisk - Jack G. Swisher, Jr.

8. Deposition to show court reporter's sworn notation as to who was present at Fisk deposition, contradicting Fisk testimony at Evidentiary Panel hearing of July 9, 1994.

9. Texas Workers' Compensation Commission written permission for plaintiff to appear at its hearings by phone.

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK SWISHER §

V. § CIVIL ACTION NO. H-94-2653

THE STATE BAR OF TEXAS §

DEFENDANT'S ORIGINAL ANSWER

The State Bar of Texas ("Defendant") files this original answer to Jack Swisher's ("Plaintiff") Original Petition for Injunctive Relief:

1. Defendant would assert that there is no subject matter jurisdiction over challenges to state court decisions in particular attorney disciplinary cases, or in the alternative, there is no subject matter jurisdiction over a claim against the State Bar of Texas which, is grounded in or inextricably intertwined with aspects of attorney disciplinary proceedings, or in the alternative, the Younger doctrine bars Federal Court intervention in ongoing State proceedings.
2. Defendant admits the averments contained in Plaintiff's Paragraph 1 pertaining to his residence, good standing, and physical condition. Plaintiff is without sufficient information to form a belief as to his status regarding Title 42, Section 12101 et seq., Chapter 126, USC.

   Defendant denies Plaintiff's averments regarding the State Bar of Texas. The State Bar of Texas is quasi governmental agency funded by Bar dues. The proper agent for service is James McCormack, State Bar of Texas General Counsel.
3. Defendant admits Plaintiff seeks injunctive relief under various authority per the averments contained in Plaintiff's Paragraph 2. Defendant admits that it is charged with administering the attorney disciplinary system as contemplated by the Texas Rules of Disciplinary Procedure.

   Defendant denies that it has deprived Plaintiff of his rights, privileges, immunities, and property without due process of law and equal protection of the laws.

   Defendant denies it presented communication barriers to

notice and due process. Plaintiff was provided notice of evidentiary hearing in the matter of HO-0029302513 / Johnny J. Fisk - Jack G. Swisher, Jr.

4. It is Defendant's understanding that Plaintiff was not present at the evidentiary panel hearing, and the Chair of the evidentiary panel placed a courtesy call prior to beginning the proceeding. Plaintiff returned the call following the close of evidence and prior to ruling. Plaintiff acknowledged at that time that he did have notice of the evidentiary panel hearing.

   Defendant is without sufficient information to admit or deny the averments in Plaintiff's Paragraph 3 regarding his reliance on his parallel's erroneous information. Defendant denies that the conduct of the proceedings presented a communications barrier. Defendant further denies that the panel hearing occurred without an opportunity for Plaintiff to defend himself. Plaintiff was noticed and the failure to attend was due to Plaintiff's error.

   Defendant is without sufficient information to admit or deny Plaintiff's averments regarding the Fisk testimony before the panel.

   Defendant admits that Plaintiff timely filed a Notice of Appeal.

   Defendant would show that the balance of Plaintiff's averments in Paragraph 3 are moot because the evidentiary panel has stayed its suspension order.

5. Defendant would show that the averments contained in Plaintiff's Paragraphs 5 and 6 are moot because a Stay of Suspension has been granted.

6. Defendant would show that the averments contained in Plaintiff's Paragraph 7 are moot because a Stay of Suspension has been granted.

7. Defendant is without sufficient information to admit or deny the averments in Plaintiff's Paragraph 8. Plaintiff timely perfected an appeal and those issues will be resolved before the Board of Disciplinary Appeals.

8. Defendant would show that the averments contained in Plaintiff's

Paragraph 7 are moot because a Stay of Suspension has been granted.

9. Defendant would show that Plaintiff failed to appear for an evidentiary panel hearing following proper notice. Defendant would further show that a Stay of Suspension has been granted, that Plaintiff's Motion for Rehearing of the Evidentiary Panel Decision will be presented in the near future, and that he can appear by telephone. Defendant would further show that Plaintiff timely perfected an appeal of the evidentiary panel decision and that his procedural due process rights are preserved.

Respectfully submitted,

James M. McCormack
General Counsel
Stephen D. Statham
Assistant General Counsel
Office of the General Counsel
STATE BAR OF TEXAS
1111 Fannin, Suite 1370
Houston, Texas 77002
(713) 759-6931
Fax No. (713) 759-1932

_____
STEPHEN D. STATHAM
State Bar No. 19082500
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the 22nd day of August, 1994, a true and correct copy of Defendant's Original Answer was delivered to Jack Swisher, Respondent pro se, by facsimile at the facsimile number (713) 978-6342.

_____
STEPHEN D. STATHAM

BEFORE THE EVIDENTIARY PANEL FOR THE STATE BAR DISTRICT NO. 041, THE STATE BAR OF TEXAS

STATE BAR OF TEXAS	§	
v.	§	NO. H0029302513
JACK SWISHER, JR.	§	
Houston, Texas	§	

ORDER GRANTING NEW TRIAL

On the 25th day of August, 1994, the Evidentiary Panel heard the motion for new trial duly filed by JACK G. SWISHER, JR., Respondent, in the above-entitled and numbered cause.

The motion was duly presented to the Evidentiary Panel, and the Evidentiary Panel is of the opinion that the motion should be granted.

IT IS, THEREFORE, ORDERED that:

1. The motion for new trial in this cause be granted;
2. The case is set for hearing on September 20, 1994 at 5:00 PM at 1111 Fannin, Suite 1370, Houston, Texas 77002;
3. The Evidentiary Panel decision of July 9, 1994 in cause number H0029302513, State Bar of Texas vs. Jack G. Swisher, Jr., is hereby vacated; and
4. Respondent's practice of law is hereby permitted to continue without suspension.

SIGNED this 30th day of August, 1994.

EVIDENTIARY PANNEL
DISTRICT NO. 041
STATE BAR OF TEXAS

BY: _____
Steve Howard
Evidentiary Panel Chair 041

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK SWISHER, Plaintiff)

VS.) CIVIL ACTION NO. H-94-2653

STATE BAR OF TEXAS, Defendant)

ORDER DISMISSING PETITION FOR TEMPORARY INJUNCTIVE RELIEF (Proposed by Petitioner)

In that defendant has scheduled a telephone conference rehearing by its Evidentiary Panel of the matter of HO-0029302513 / Johnny J. Fisk - Jack G Swisher, Jr., on September 29, 1994, at 5:00 p.m., and as Plaintiff's issues before this Court are now moot, it is therfore

ORDERED, ADJUDGED and DECREED that plaintiff's petition for temporary injunction is dismissed, without prejudice.

SIGNED this _____ day of _____, 1994, Houston, Harris County, Texas.

_____
PRESIDING JUDGE

APPROVED:

_____
Jack Swisher
Attorney at Law
TBA #19589000
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JACK SWISHER,	§	
Plaintiff,	§	
versus	§	CIVIL ACTION H-94-2653
STATE BAR OF TEXAS,	§	
Defendant.	§	

ORDER OF DISMISSAL

On the agreement of the parties, this case dismissed.

Signed September 12th, 1994, at Houston, Texas

Lynn N. Hughes
United States District Judge

No. 05304

BEFORE THE
BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER,

APPELLANT

V.

THE STATE BAR OF TEXAS,

APPELLEE

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____

Jack Swisher
Attorney at Law
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161; fax 713/802-6565
TBA #19589000

BEFORE THE
BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER,

APPELLANT

V.

THE STATE BAR OF TEXAS,

APPELLEE

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

COMES NOW Appellant, Jack Swisher, filing this Appellant's Motion, Notice Of Motion, And Order For Continuance, For Continuance Hearing Appearance By Telephone, And For The Appellate Hearing Of His Case In Chief By Tele-video Conferencing in the above styled cause and, as grounds therefor, would show as follows:

I.

Appellant has defended this case to date with due diligence.

II.

This motion is not meant for delay only. The ends of justice would best be served by the Board of Disciplinary Appeal's granting this motion for continuance.

Appellant will diligently defend this action through appeal on its merits, if permitted to do so by grant of this motion.

III.

Appellant is an American individual with physical disabilities that substantially limit one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment. He was and is one of a class of individuals protected by the provisions of Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. He now asks that he be allowed to have his appellate hearing conducted by live video, with him appearing *pro se*, for which purpose he submits an exemplar descriptive video tape, and that he be allowed to appear by telephone at the continuance hearing to consider these matters.

Prior to the appellate hearing Appellant requests that he be allowed to demonstrate the equipment and methods reasonably necessary to permit the appellate hearing to occur, with the least inconvenience to the Board of Disciplinary Appeals, so that the viability of this proposal may be determined to the Board's satisfaction.

It is only recently that Appellant became aware that the courts, as State agencies (arguably including the Board of Disciplinary Appeals), are bound by the provisions of the Americans with Disabilities Act:

"Regulation promulgated pursuant to ADA, concerning examinations offered by private entities, applied to New York State Board of Law Examiners; although regulation referred to "private entity," Act defined "person" to include governments and government agencies.

In 1992, Congress passed the ADA to address the problem of discrimination against persons with disabilities. Specifically, the ADA prohibits discrimination

1. in employment (Title I),
2. in public services and public transportation (Title II),

3. in public accommodations (Title III), and
4. in telecommunications (Title IV).

Title II of the ADA, 42 U.S.C. § 12131 et seq., which is the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132." *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284.

"As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993.

At issue is whether or not the day has arrived for severely disabled Texas attorneys, and parties, to be permitted to present their cases before the Board of Disciplinary Appeals employing todays more-than-adequate audio/video technologies, or continue to face the old transportation and communication barriers that the Americans with Disabilities Act was intended to remove.

In support hereof Appellant testifies as follows:

1. "Both of my arms have been paralyzed since 1952, and two-thirds of my breathing strength, the latter requiring my use of iron lungs and other respirator equipment to sleep in at night for those 43 years, and I currently use a respirator most of the day to practice law. It requires the assistance of another person for me to appear, and the process operates as a severe transportation and communication barrier which can be simply removed by allowing appearance by audio/video communication (*a method by telephone alone is allowed by the Texas Workers' Compensation Commission for my hearings before the Commission, in and out of Houston, and by Rule 202(2), Texas Rules of Civil Procedure, for taking oral depositions of witnesses)."
2. The Americans with Disabilities Act recites in pertinent part:

   The Congress finds that--

   (3) discrimination against individuals with disabilities

persists in such critical areas as transportation, communication, and access to public services;

(5) individuals with disabilities continually encounter various forms of discrimination, including the discriminatory effects of transportation, and communication barriers, failure to make modifications to existing practices, and relegation to lesser opportunities;

(6) people with disabilities, as a group, are severely disadvantaged vocationally, economically;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

IV.

In order to support a showing of diligence in defending this case, Appellant will conclude the necessary audio/video equipment and methods demonstration in time to present his case

at the appellate hearing within the next 180 days, or as the Board deems fair, though he will be discriminated against by the Board, under ADA, without the requested appearance by live audio/video equipment and methods.

PREMISES CONSIDERED, Appellant requests that the appellate hearing be postponed for another 180 days, or for some reasonable period of time determined by the Board of Disciplinary Appeals, so that the Board may determine the efficacy of this request; that he be allowed to appear by telephone for the continuance hearing to consider these matters; that he be allowed to appear by tele-video conferencing for the appellate hearing; and that he have all other entitled general and special relief, at law and in equity.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to Ms. Christine McKeeman, Board of Disciplinary Appeals, P.O. Box 12426 Capitol Station, Austin, Texas 78711, 512/475-1578, fax 512/463-1475, and Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607, by certified mail, return receipt requested, or faxed or delivered, May 28, 1996.

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____

Jack Swisher
Attorney at Law
TBA #19589000
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

NO. 05304

BEFORE THE
BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER, Appellant

V.

THE STATE BAR OF TEXAS, Appellee

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING

NOTICE OF MOTION

TO: Ms. Christine McKeeman, Board of Disciplinary Appeals, P.O. Box 12426 Capitol Station, Austin, Texas 78711, 512/475-1578, fax 512/463-1475, and Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607:

You will take notice that at _____ _____.m., _____, 1995, before the appellate hearing, or as soon thereafter as is practical, the attached Motion will be presented to the Board of Disciplinary Appeals for ruling, on oral hearing.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to Ms. Christine McKeeman, Board of Disciplinary Appeals, P.O. Box 12426 Capitol Station, Austin, Texas 78711, 512/475-1578, fax 512/463-1475, and Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607, by certified mail, return receipt requested, or faxed or delivered, May 28, 1996.

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____

Jack Swisher, Appellant *pro se*
TBA #19589000
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

NO. 05304

BEFORE THE
BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER, Appellant

V.

THE STATE BAR OF TEXAS, Appellee

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING

ORDER

On this day came on for consideration appellant, Jack Swisher's, Motion that he be allowed to appear by telephone at the continuance hearing to consider his requested permission to appear for, and to conduct, the appellate hearing by live tele-video in the above captioned cause. The Court has determined that the motion should be GRANTED. It is, therefore,

ORDERED, ADJUDGED and DECREED that appellant, Jack Swisher's, Motion is granted that he be allowed to appear by telephone at the continuance hearing to consider his requested permission to appear for, and to conduct the appellate hearing by live tele-video in the above captioned cause.

SIGNED this _____ day of _____, 19_____.

_____
PRESIDING JUDGE

APPROVED:

LAW OFFICES OF JACK SWISHER

Jack Swisher
Attorney at Law
TBA #19589000
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

NO. 05304

BEFORE THE

BOARD OF DISCIPLINARY APPEALS

JACK G. SWISHER, Appellant

V.

THE STATE BAR OF TEXAS, Appellee

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING

ORDER

On this day came on for consideration appellant, Jack Swisher's, Motion for Continuance in the above captioned cause. The Board of Disciplinary Appeals has determined that the Motion should be GRANTED. It is, therefore,

ORDERED, ADJUDGED and DECREED that appellant, Jack Swisher's, Motion is granted, and that the appellate hearing is hereby set for _____, 19____.

SIGNED this _____ day of _____, 19____.

_____
PRESIDING JUDGE

APPROVED:

LAW OFFICES OF JACK SWISHER

_____

Jack Swisher
Attorney at Law
TBA #19589000
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565

CAUSE NO. 05304

JACK G. SWISHER, JR.	§	BEFORE THE BOARD
v.	§	OF
COMMISSION FOR LAWYER DISCIPLINE APPEALS	§ §	DISCIPLINARY

ORDER GRANTING APPELLANT'S MOTION FOR CONTINUANCE, DENYING MOTION FOR CONTINUANCE HEARING, AND TAKING MOTION FOR TELE-VIDEO CONFERENCING UNDER ADVISEMENT

On May 3, 1995, came on to be heard APPELLANT JACK G. SWISHER, JR.'S MOTION FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR THE APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING in the above cause. After reviewing the pleadings, the Board of Disciplinary Appeals is of the opinion that Appellant's MOTION FOR CONTINUANCE should be granted; however, the Board denies Appellant's request for 180 days. The Board is further of the opinion that Appellant's MOTION FOR CONTINUANCE HEARING BY TELEPHONE should be denied. The Board further takes Appellant's MOTION FOR APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING under advisement.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that Appellant JACK G. SWISHER, JR.'S MOTION FOR CONTINUANCE be and hereby is, granted, and that this case be continued until reset by further order of this Board.

IT IS FURTHER ORDERED that Appellant's MOTION FOR CONTINUANCE HEARING BY TELEPHONE be and hereby is, denied.

IT IS FURTHER ORDERED that APPELLANT'S MOTION FOR APPELLATE HEARING OF HIS CASE IN CHIEF BY TELE-VIDEO CONFERENCING be taken under advisement.

SIGNED this 4th day of May, 1995.

_____

STEVEN J. WATKINS, CHAIRMAN
BOARD OF DISCIPLINARY APPEALS

CAUSE NO. 05304

JACK G. SWISHER, JR.	§	BEFORE THE BOARD
v.	§	OF
COMMISSION FOR LAWYER DISCIPLINE APPEALS	§ §	DISCIPLINARY

ORDER DENYING APPELLANT'S MOTION FOR TELE-VIDEO CONFERENCING AND SETTING CASE FOR SUBMISSION

On May 11, 1995, came on to be heard Appellant Jack G. Swisher, Jr.'s Motion for Appearance at the Appellate Hearing of His Case in Chief by Tele-Video Conferencing in the above cause. After reviewing the pleadings, the Board of Disciplinary Appeals is of the opinion that Appellant's motion should be denied because it would result in a fundamental alteration of the nature of the hearing and further result in an undue administrative burden. However, the board finds that a reasonable accommodation for Appellant would be to hold the hearing in Houston, Texas, and that this would remove any transportation or communication barriers which may exist to Appellant's participation in the proceeding.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that Appellant Jack G. Swisher, Jr.'s Motion for Appearance at the Appellate Hearing of His Case in Chief by Tele-Video Conferencing be and hereby is, denied.

IT IS FURTHER ORDERED that submission on oral argument of the case be scheduled for 11:00 a.m. Friday, June 16, 1995, in the offices of Nathan, Wood, & Sommers, P.C., 2700 Post Oak Boulevard, Suite 2500, Houston, Texas.

SIGNED this 17th day of May, 1995.

_____

STEVEN J. WATKINS, CHAIRMAN
BOARD OF DISCIPLINARY APPEALS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK SWISHER, Plaintiff)

VS.) CIVIL ACTION NO. H-94-2653

STATE BAR OF TEXAS, ET AL, Defendants)

PLAINTIFF'S SUPPLEMENTAL PETITION FOR INJUNCTION, AND REQUEST FOR PERMISSION TO APPEAR BY TELEPHONE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jack Swisher, hereinafter called Plaintiff, complaining of the Texas Board of Disciplinary Appeals ("BODA"), an agency of the State of Texas, and the State of Texas, hereinafter called Defendants, and for cause of action would show as follows:

PARTIES

On different issues from those herein presented, plaintiff's earlier action for injunction in the above styled cause was denied. It was thereafter amended to an action for damages which is pending before this Court. In the collateral State court disciplinary action styled Jack Swisher v. The State Bar of Texas, Cause No. 05304, Before the Board of Disciplinary Appeals, there is also pending plaintiff's appeal of the State Bar disciplinary judgment in which plaintiff was assessed a 5-month active suspension, with seven months probated and a $2,700 + fine in the form of attorney fees (see attached copy of judgment, Exhibit A). That appeal is before BODA.

1. On the occasions made the basis of this Supplemental Petition for Injunction plaintiff resided in Harris County, Texas, and was and is one of a class of duly licensed practicing attorneys in good standing with the State Bar of Texas, as stay of the

referenced suspension is in effect pending the appeal (see attached copy of stay order, Exhibit B).

2. Plaintiff was at all material times an American individual with physical disabilities that substantially limited one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment. He was and is one of a class of individuals protected by the provisions of Title 42, § 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. ("ADA"), which had been made known to defendants by him at all material times.

3. BODA was at all material times a government agency of the State of Texas doing business as such in and under the laws of the State of Texas, and has been this date notified of these contents by certified mail and fax..

JURISDICTION.

4. This is a petition for temporary and permanent injunctive relief against defendants, under the provisions of the 14th Amendment to the United State Constitution, 42 U.S.C., §§ 1983, 1985 and 1985(3), and under 42 U.S.C., § 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. ("ADA") - ["State courts have concurrent jurisdiction with federal courts over ADA claims; however, existence of such concurrent jurisdiction does not alter fact that ADA actions are federal question cases. *Jones v. Illinois Cent. R. Co.*, N.D.Ill.1994, 859 F.Supp. 1144."]. It is prompted for the following reasons:

   A. On or about April 27, 1995, plaintiff filed with BODA an original and 10 copies of his Appellant's Motion, Notice of Motion, and Order for Continuance, for Continuance Hearing Appearance by Telephone, and for the Appellate Hearing of his Case in Chief By Tele-video Conferencing (see attached copy thereof, Exhibit C, and copy of the

exemplar VCR tape plaintiff provided therein to BODA describing the proposed tele-video conferencing facilities).

B. It was his plea and purpose, under the provisions of the ADA, that BODA give him a hearing to address the issue of the feasibility of his appearance at the BODA June 16, 1995 appellate disciplinary hearing by electronic audio/visual communication with the BODA members and the State's prosecutor therein (see attached copy of notice thereof, Exhibit D).

C. In its May 17, 1995 response BODA denied plaintiff that hearing, with no reason given (see attached copy of judgment, same Exhibit D).

D. BODA also therein denied plaintiff an opportunity to appear by tele-video conferencing at the BODA appellate disciplinary hearing of plaintiff's case, making the finding, without hearing or testimony, that such a hearing "...would result in a fundamental alteration of the nature of the hearing and further result in an undue administrative burden." *Id.*

In effect BODA entered a summary judgment on the issue, without meeting its required burden of proof under the ADA, e.g.

"Employer did not establish, for purposes of motion for summary judgment, that accommodation requested by employee was unreasonable or would impose undue hardship, or that accommodations offered fulfilled employer's obligations under the ADA, where employer did not produce any evidence to show that employee's unscheduled absences caused by intermittent migraine headaches were unduly disruptive or resulted in essential work not being completed in timely manner, and employee wanted to use vacation time for unscheduled absences due to illness when he had used available sick days, but employer offered plaintiff part-time work schedule or flexible prescheduled full-time schedule." *Dutton v. Johnson County Bd. of County Com'rs*, D.Kan.1994, 859 F.Supp. 498.

E. BODA made the further finding in its denial order, without hearing or testimony, that "...a reasonable accommodation for Appellant would be to hold the hearing in Houston, Texas, and that this would remove any transportation or communication barriers which may exist to Appellant's participation in the proceeding." *Id.* Again, this ruling violated ADA per *Dutton*, supra, and was made despite plaintiff's Exhibit B allegations that:

> "Both of my arms have been paralyzed since 1952, and two-thirds of my breathing strength, the latter requiring my use of iron lungs and other respirator equipment to sleep in at night for those 43 years, and I currently use a respirator most of the day to practice law. It requires the assistance of another person for me to appear, and the process operates as a severe transportation and communication barrier which can be simply removed by allowing appearance by audio/video communication."

Simply having the hearing in Houston, instead of Austin, does not remove the transportation and communication barriers to plaintiff's appearance prohibited by the ADA. He still has to have the paid assistance of others and the discomfort of manipulating his breathing apparatus in transporting him to and from the hearing, and during the hearing.

CASE OF FIRST IMPRESSION

5. This is an ADA action against the State of Texas and BODA, ultimately including the State Bar and its members who've violated the ADA mandates and plaintiff's 14th Amendment rights in processing disciplinary proceedings against plaintiff. Simply put, plaintiff is requesting that the State of Texas put in a phone line to its BODA hearing room and attach off-the shelf video technology so that plaintiff may make an appearance at the BODA appellate hearing to be convened against him. Plaintiff

will provide his own phone line and compatible video equipment at his end, without cost to defendants. In essence his ADA request is that defendants provide the electronic video ramp at their end, analogized to a sidewalk corner ramp, and that plaintiff provide his own electronic wheelchair to use that ramp. Defendants have not only failed to meet their ADA burden in denying this request, they have denied plaintiff his 14th Amendment rights to fair notice and hearing on the issue.

This action further challenges the State Bar Rules of Disciplinary Procedure to the extent they circumvent, or are reasonably calculated to circumvent, the provisions and mandates of the ADA.

Presented are issues of first impression in Texas of such fundamental fairness that they demand scrutiny under both the ADA and the 14th Amendment to the U. S. Constitution. Two factors impose the issues on all of those involved in the outcome of this case:

A. Plaintiff is not just an attorney, but is also a severely disabled American citizen under the provisions of the ADA. Moreover, his physical disabilities are more severe than those of any of the thousands of injured clients he has represented in 29 years of personal injury and workers compensation law practice.

B. For such citizens the ADA contains the following findings, which must be either accepted or denied in these proceedings:

> Sec. 12101. Findings and purposes
> (a) Findings
> The Congress finds that--
>
> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some

improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal

basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose
It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

6. Defendants are clearly bound by the ADA mandates, e.g.

42 U.S.C. § 12202, Chap. 126(iv). State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

"Eleventh Amendment did not bar suit against state brought in federal court alleging violation of Rehabilitation Act and Americans with Disabilities Act; Congress expressly abrogated Eleventh Amendment immunity in respective statutes." *Eisfelder v. Michigan Dept. of Natural Resources*, W.D.Mich.1993, 847 F.Supp. 78.

The courts have ruled that a state agency is bound by the

mandates of the ADA - e.g., see *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284, wherein:

"Regulation promulgated pursuant to ADA, concerning examinations offered by private entities, applied to New York State Board of Law Examiners; although regulation referred to "private entity," Act defined "person" to include governments and government agencies.

In 1992, Congress passed the ADA to address the problem of discrimination against persons with disabilities. Specifically, the ADA prohibits discrimination

1. in employment (Title I),
2. in public services and public transportation (Title II),
3. in public accommodations (Title III), and
4. in telecommunications (Title IV).

Title II of the ADA, 42 U.S.C. § 12131 et seq., which is the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132."

And,

"Board of bar examiners, as instrumentality of court, constitutes public entity within meaning of Title II of Americans with Disabilities Act." *Petition of Rubenstein*, Del.Supr.1994, 637 A.2d 1131."

Moreover, even the courts are bound by the mandates of the ADA, e.g., *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993:

As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

By attempting to circumvent the scope of the ADA defendants indicate a failure to appreciate ADA's mandates and purpose, and the steps defendants should accordingly take

in their disciplinary proceedings against plaintiff, e.g.

The Americans with Disabilities Act (ADA) is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society; thus, as a remedial statute, it must be broadly construed to effectuate its purposes. *Kinney v. Yerusalim*, E.D.Pa.1993, 812 F.Supp. 547.

7. Plaintiff uncontrovertedly is and was at all material times a disabled American meant to be protected by the provisions of the Americans with Disabilities Act, as demonstrated by his allegations, above, which state the truth that:

"Both of his arms have been paralyzed since 1952, and two-thirds of his breathing strength, the latter requiring his use of iron lungs and other respirator equipment to sleep in at night for those 43 years, and he currently uses a respirator most of the day to practice law. It requires the assistance of another person for him to appear, and the process operates as a severe transportation and communication barrier which can be simply removed by allowing his appearance by audio/video communication."

Plaintiff either sleeps in his respirator every night, or dies after two nights without it. If his contingent fee law practice is destroyed by the possible BODA appellate ruling that all of his client's files must be released and no fees earned for 5 months, plaintiff faces certain unemployment. If he does not pay his rent and light bill, and personnel for assistance in using the respirator, and dressing and bathing, he faces the imminent collapse of his health, and possible death, or he survives on the charity of others.

Of lesser consequence, his loss of legal fees in statutory and common law tort actions, and under the provisions of the Texas Workers' Compensation Act, will probably exceed $500,000 in the long term because of the 5 month shut down of his practice. Plaintiff's rights to those legal fees are protected by the 14th Amendment and, therefore, come under the

jurisdiction of this Court, e.g.

"Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). It is well settled that an interest attains the status of "property" by virtue of the fact that it has been initially recognized and protected by federal or state rules of law. It is also well established that a mutually recognizable entitlement will receive constitutional protection. *Brown v. Ledbetter*, 569 F.Supp. 170, 172 (N.D.Ga.1983) (citations omitted)." *Bodiford v. State Of Alabama, et al.*, 854 F.Supp. 886, 1994.

The issuance of mandatory and prohibitive temporary injunction will not cause undue inconvenience or loss to the defendants, but will prevent irreparable injury to plaintiff. Also, plaintiff's continued practice of law does not pose a continuing threat to the welfare of his clients or to the public.

8. Plaintiff's position throughout the State Bar proceedings has been based upon the facts concerning the following specific issues formulated by the Grievance Committee and Evidentiary Panel against him:

   A. Whether (Plaintiff) failed to file a status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593.

   B. Whether (Plaintiff's) failure to file the status report in Fisk's case resulted in Fisk's case being dismissed by the Court on December 27, 1991 for want of prosecution.

   C. Whether (Plaintiff) failed to inform Fisk of the December 27, 1991 dismissal of cause number 89-45593.

In its Reply Brief the State Bar attempted to go outside the issues in making the following argument:

"Substantial evidence exists to support the findings of the Evidentiary Panel that Swisher neglected Mr. Fisk's case and failed to keep him

informed of its status."

The propriety of plaintiff's conduct of the Fisk case in general was not the issue plaintiff was given notice to defend against, nor was it in his appeal, as he had advised the State Bar from the outset. What defenses he might have had thereto are unknown and irrelevant to those proceedings, as are the State Bar's complaints in its Reply Brief relating to matters outside its own charges. Due process would have it no other way.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 554, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (White, J., Concurring).

It is to be remembered that the disciplinary proceedings are quasi-criminal, and the Rules are to be strictly construed in favor of plaintiff, e.g.

"Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged." *Resolution Trust Corp. v. Bright*, C.A.5 (Tex.) 1993, 6 F.3d 336, rehearing denied.

It was not for lack of concern for Fisk that plaintiff restricted his defense and appeal to the matters specifically charged against him. Nor did he withdraw from civil responsibility based upon negligence of his agents. He takes his profession and its duties seriously. What the State Bar failed to state in this regard, in characterizing plaintiff:

In addition, the Respondent's disciplinary record, including any private reprimands is admissible on the appropriate Sanction to be imposed. (2.17. Imposition of Sanctions. Vernon's Texas Statutes And Codes Annotated, Government Code, Title 2. Judicial Branch, Subtitle G. Attorneys, Title 2, Subtitle G--Appendixa-1. Rules Of Disciplinary Procedure, Part Ii. The

District Grievance Committees)

No such evidence was admitted because appellant has never received a disciplinary sanction in his 29 years of law practice in Texas. The Rules in issue were:

Rule 1.01 (b) (1)	... a lawyer shall not ... (1) neglect a legal matter entrusted to the lawyer;
(c)	As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client ...
Rule 1.03 (a)	A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [*(b) and Comments 1 through 5 indicate issues regarding a lawyer's knowingly withholding information from a client.]

The record and evidence before the Evidentiary Panel established as a matter of law that Plaintiff violated neither Rule 1.01(b)(1) nor Rule 1.03(a), Texas Rules of Disciplinary Procedure, Texas Government Code, V.T.S.C.A. The panel had the burden to prove two components, objective knowledge by Plaintiff [*knew or should have known] and subjective knowledge [actually knew] of the issue events. *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994). The record is devoid of the subjective component relative to the specific charges levied against plaintiff.

The State Bar attempted in its Reply Brief to escape *Moriel's* reach by arguing as follows:

"Swisher's reliance upon *Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 Tex. 1994)* is misplaced. *Moriel* is a bad faith insurance claim and deals with the traditional definition of gross negligence and

how it should be applied in the context of a bad faith insurance coverage dispute."

However, while *Moriel* happened to be a 'bad faith' case, it was meant to and did define gross negligence differently from Texas case law before it in all legal settings, not just those concerning 'bad faith' processing of workers compensation cases. As the *Moriel* court noted:

> 1. The Definition of Gross Negligence
>
> [8] In *Burk Royalty*, 616 S.W.2d at 920, we analyzed the history of gross negligence evidentiary review in Texas at length and determined that "all roads" lead to the following definition of gross negligence: Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. This definition is taken verbatim from *Missouri Pac. Ry. v. Shuford*, 72 Tex. 165, 171, 10 S.W. 408, 411 (1888), and is little changed since this court first defined gross negligence in *Southern Cotton Press*, 52 Tex. 587 (1880) ("that entire want of care which would raise a presumption of conscious indifference to consequences"). In 1987, however, the legislature modified the common law definition: "Gross negligence" means more than momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. [FN10]
>
> TEX.CIV.PRAC. & REM.CODE ANN. § 41.001(5) (Vernon Supp.1994) (emphasis added). The statutory definition of gross negligence, when compared with the common law definition, emphasizes that the evidence must "establish" the defendant's actual conscious indifference, rather than raise the mere belief that conscious indifference might be attributable to a hypothetical reasonable defendant. [FN11]. *Id.* at 20.

But the matter does not end with *Moriel*. The Court can look to the Constitutional requirement of such subjective knowledge by plaintiff. Taken as a whole the State Bar's conduct violates plaintiff's

Title 42, § 1983, U.S.C. rights, as its September, 1994 hearing ruling was wrongfully retaliatory and deprived plaintiff of his 8th Amendment rights, as it imposed cruel and unusual punishment and excessive fines and penalties on him (*Helling Et Al. v. Mckinney*, U.S.Sup.Ct. Argued January 13, 1993-Decided June 18, 1993; No. 92-7247, *Farmer v. Brennan, Warden, et al*, U.S.Sup.Ct. [June 6, 1994]; *Austin v. United States*, U.S.Sup.Ct. Decided June 28, 1993).

In *Farmer* Justice Souter delivered the opinion of the Court on the issue of the requirement of subjective awareness:

"A prison official's -deliberate indifference- to a substantial risk of serious harm to an inmate violates the Eighth Amendment. See *Helling v. McKinney* 509 U. S. __ (1993); *Wilson v. Seiter*, 501 U. S. 294 (1991); *Estelle v. Gamble*, 429 U. S. 97 (1976). This case requires us to define the term -deliberate indifference,- as we do by requiring a showing that the official was subjectively aware of the risk."

Appellant has met the notice requirements set out in *Farmer* and *Helling*. It is to be determined whether or not, under the ADA, he is to be given the same 8th Amendment protection as is an incarcerated trans-sexual felon, and whether or not the risk to his health of the State Bar's ruling rises to the level of that in which the felon was exposed to secondary cigarette smoke. In this regard, and as newly discovered evidence developed during, and submitted on, the appeal to BODA, plaintiff fainted and was taken to Rosewood Hospital the day before Thanksgiving, 1994, in severe respiratory distress, and was found to have elevated carbon dioxide levels, i.e., pCO_2 of 49, and the right atrial [heart] enlargement indicative of respiratory distress (see attached copy of hospital summary diagnosis, Exhibit E).

9. Plaintiff is likely to ultimately succeed on the merits in the appeal of his claim, assuming, partly, that he his allowed to appear in the tele-video conference manner requested under

the ADA (the State Bar Evidentiary Panel members and its prosecutor apparently have never seen plaintiff, else they'd have judicially noticed his clearly evident physical disabilities, rather than submit in the State Bar Reply Brief that plaintiff had not proven them.). However, whether or not plaintiff prevails on appeal will be materially and substantially affected by whether or not BODA is able to communicate with plaintiff through the audio/video method requested, as a result of which his severe disabilities will for the first time become apparent to them.

It must be remembered that when plaintiff was not present at his first Evidentiary Panel hearing below he was assessed a 3-month active suspension, with nine months probated and a $900 + fine (in the form of attorney fees). After his appeal to this Court to appear by telephone before the Panel on rehearing, he was assessed a 5-month active suspension, with only seven months probated and a $2,700 + fine (in the form of attorney fees). The increased punishment was wrongfully retaliatory, as the only change in the record and evidence before the Panel was plaintiff's testimony and court reporter exhibit refuting the State Bar's case.

10. BODA has a burden of proof to meet in denying plaintiff's request for tele-video conferencing (the ADA component of this petition for injunction), one that plaintiff is entitled to rebut on properly noticed hearing (the 14th Amendment component). But, BODA has entered its findings and ruling without having seen or spoken with plaintiff at a hearing on the issue of the feasibility of plaintiff's appearance to defend himself by tele-video conferencing. Simply put, BODA has broken the law on both counts, and from that position is preparing to decide plaintiff's future in a quasi-criminal proceeding which,

because of plaintiff's physical impairments, bring 8th Amendment issues of excessive fines and cruel and unusual punishment into consideration (as alleged in plaintiff's action for damages in his case in chief before this Court).

In its Reply Brief the State Bar presented the following misleading argument to BODA:

"Finally, the Eight Amendment of the U.S. Constitution regarding cruel and unusual punishment does not apply in civil cases. *Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Zwick v. Freeman, 373 F2d 110, 119 (1967); Calzarano v. Liebowitz, 550 F. Supp. 1389, 1390 (N.Y. 1982).*"

Plaintiff had plead 8th Amendment violations by the State Bar, which included those of 'cruel and unusual punishment' and 'excessive fines'. In arguing that these violations do not apply in civil cases the State Bar was simply wrong. It cited 1977 *Ingraham*, from which the dissenting opinions of Justices White, Brennan, Marshall and Stevens forecasted the law today:

"We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. [FN2] The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." Ante, at 1410. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "(E)ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop v. Dulles*, 356 U.S. 86, 95, 78 S.Ct. 590, 595, 2 L.Ed.2d 630 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated *687 with punishment, such as retribution, rehabilitation, or deterrence. [FN3] Id., at 96,

78 **1421 S.Ct., at 595. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)." *Id.* at 686.

The State Bar failed to mention the matter had already been put to rest:

"The United States now argues that "any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted. It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). We disagree." *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993)

"In *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. Id., at 665, 97 S.Ct., at 1409. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears designed to catalogue the misdeeds of James II, see ibid., rather than to define the scope of the substantive rights set out in subsequent sections." Id. at note 5.

"The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning-Ferris*, 492 U.S., at 266-267, 275, 109 S.Ct., at 2916, 2919. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, "as punishment for some offense." Id., at 265, 109 S.Ct., at 2915 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper*, 490 U.S. 435, *2806 447-448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989)" Id. at notes 3, 4.

11. Plaintiff has yet to visually face his judges and prosecutors in the State Bar disciplinary proceedings against him, and their cumulative rulings against him, from the Evidentiary Panel to the BODA level, suggest retaliatory conduct against him for exercising his rights under the ADA, which conduct is specifically prohibited under the ADA, e.g.

> 42 U.S.C. § 12203, Chap. 126(iv). Prohibition against retaliation and coercion
>
> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

That defendants' conduct may be retaliatory, if not conspiratorial under the provisions of the federal Civil Rights Act, may be gleaned from their conduct to date of the disciplinary proceedings against plaintiff, under a clearly assumed shelter of government immunity. As an additional discriminatory example, in its response to plaintiff's appeal the State Bar made the following disingenuous argument in its brief:

"He [plaintiff] presented no evidence before the Panel regarding his disabilities. The first time these matters were raised were in his initial notice of appeal from the first hearing. As such, he has not properly preserved these complaints on appeal."

This argument inexcusably ignored the following facts:

A. Plaintiff's disabilities constituted the foundation of his earlier sworn federal court injunction hearing in this Court herein, at which three attorneys from the State Bar were present, and from which the Bar grudgingly granted plaintiff the right to appear at its second Evidentiary Panel hearing

by telephone because he was a disabled American under the ADA. The Bar would not have allowed his phone appearance for any other reason.

B. When swom in by the Evidentiary Panel in those proceedings plaintiff testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.

C. When sworn in by the Grievance Committee on some dozen prior occasions over the years, 4 or 5 of those video recorded and none resulting in disciplinary rulings against him, plaintiff testified as to his disabilities on explaining that he could not raise his right hand to take the oath his giving testimony required.

D. More simply, evidence regarding plaintiff's disabilities came from defendants' own witness, e.g., in its First Reply Point on appeal the State Bar stated:

'Mr. Fisk described Swisher by saying "his arms are rather distinctive, like they're paralyzed or something." (S.F. II. 11).'

12. The State Bar Rules of Disciplinary Procedure, making no reference to the ADA, violate plaintiff's rights under the provisions of the ADA, and the 8th and 14th Amendments to the United States Constitution, as follows:

A. They are so vague, indefinite, and broad as to wrongly permit a ruling without Plaintiff's physical disabilities under the ADA having to be fairly considered on proper notice and hearing.

B. They permit arbitrary imposition of excessive fines and penalties and cruel and unusual punishment of physically disabled attorneys who come under the provisions of the ADA.

13. The case has taken on substantive and procedural characteristics not intended by our Texas legislature. Ignoring the mandates and spirit of the ADA, and the fundamental 14th Amendment due process requirements of providing fair notice and hearing to plaintiff before depriving him of his life, liberty, and/or property, and equal protection under the law, and citing

inapplicable law, all under the guise of the State Bar Rules of Disciplinary Procedure which neither acknowledge nor appear to follow the mandates of the ADA, the conduct of defendants is now in question. Acting under color of authority and law of the State of Texas, both in their individual capacities and official capacities as representatives of the State Bar, they have wronged Plaintiff by reason of the following:

A. BODA entered its findings and ruling without having seen or spoken with plaintiff at a hearing on the issue of the feasibility of plaintiff's appearance to defend himself by tele-video conferencing (the 14th Amendment component).

B. BODA has failed to both accept and meet its ADA-required burden of proof in denying plaintiff's request for tele-video conferencing (the ADA component of this petition for injunction), one that plaintiff is entitled to rebut on properly noticed hearing.

In another setting defendants' avoidance of the ADA and 14th Amendment in deciding whether or not plaintiff has violated the State Bar Rules of Disciplinary Procedure, and whether or not plaintiff's continued practice of law constitues a danger to his clients and the public, would seriously call in to question both the competence and the lack of bias of BODA to fairly consider these issues. In any event, plaintiff is poised unfairly as a resultant victim unless he be at least allowed to appear and defend himself, free of the transportation and communication barriers which the ADA mandates be removed.

14. By reason of the foregoing plaintiff requests permission to appear before the Court by telephone to consider the foregoing matters.

WHEREFORE, Plaintiff requests that:

1. Defendants be cited to appear and answer herein.
2. Plaintiff be permitted to appear before this Court by telephone to consider the matters herein.
3. Defendants be enjoined from conducting their June 16, 1995 hearing of plaintiff's disciplinary appeal until:
   i. some reasonable time after they have given plaintiff proper notice and hearing on the issues of the feasibility of plaintiff's appearance before BODA by tele-video conferencing to defend himself at the hearing of his disciplinary appeal, and
   ii. have therein met their ADA-required burden of proof for denying plaintiff's request for tele-video conferencing.
4. Plaintiff be awarded reasonable attorney's fees, under the provisions of the ADA and 42 U.S.C. § 1988.
5. Plaintiff have all entitled remedies at law and in equity.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to Ms. Christine McKeeman, Board of Disciplinary Appeals, P.O. Box 12426 Capitol Station, Austin, Texas 78711, 512/475-1578, fax 512/463-1475, and Ms. Elaine Machuga Moore, Member, State Bar of Texas, Evidentiary Panel of District 041, Grievance Committee, 1111 Fannin, Suite 1370, Houston, Texas 77002, 759-6931, fax 759-1932, by certified mail, return receipt requested, or faxed or delivered, and in accordance with Rule 5, Federal Rules of Civil Procedure, on May 25, 1995.

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____
Jack Swisher

Attorney at Law
1445 North Loop West, Suite 110
Houston, Texas 77008
713/961-0161; fax 713/802-6565
Federal Bar No. 8596

I have read the above and foregoing, and swear that same is true and correct, to certify which my signature is is below given on the date first hereinafter set out.

STATE OF TEXAS SIGNED:

COUNTY OF HARRIS

_____

Affiant - Jack Swisher

BEFORE ME, the undersigned authority, personally appeared the above affiant who, on oath, stated that the above and foregoing is true and correct, to certify which my hand and seal of office are below subscribed this May 25, 1995.

My Commission Expires:

_____

_____

Notary Public in and for
Harris County, Texas

LIST OF EXHIBITS

A. State Bar disciplinary judgment in which plaintiff was assessed a 5-month active suspension, with seven months probated and a $2,700 + fine in the form of attorney fees.

B. Stay of State Bar disciplinary judgment in which plaintiff was assessed a 5-month active suspension, with seven months probated and a $2,700 + fine in the form of attorney fees.

C. [Plaintiff]'s Motion, Notice of Motion, and Order for Continuance, for Continuance Hearing Appearance by Telephone, and for the Appellate Hearing of his Case in Chief By Tele-video Conferencing.

D. May 17, 1995 response by Texas Board of Disciplinary Appeals ("BODA") denying plaintiff both tele-vidoe conference hearing, and hearing to determine feasibility of such a hearing.

E. Rosewood hospital summary diagnos of plaintiff's Thanksgiving, 1994 severe respiratory distress, with elevated carbon dioxide level findings and the right atrial [heart] enlargement indicative of respiratory distress.

CAUSE NO. 05304

JACK G. SWISHER, JR.	§	BEFORE THE BOARD
v.	§	OF
COMMISSION FOR LAWYER DISCIPLINE APPEALS	§ §	DISCIPLINARY

ORDER CONTINUING HEARING

On May 25, 1995, the Board of Disciplinary Appeals, without admitting the merits of Respondent's allegations as set forth in his Supplemental Petition for Injunction in the case styled Jack Swisher v. State Bar of Texas, et al., Cause No. H-94-2653, United States District Court for the Southern District of Texas, Houston Division, and further expressly denying same, continued on its own motion the hearing set for June 16, 1995, until further order of the Board.

The Board also takes the matter of the procedure for conducting the hearing before the Board under advisement.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the hearing be and hereby is, continued, until further order of the Board.

SIGNED this 26th day of May, 1995.

STEVEN J. WATKINS, CHAIRMAN
BOARD OF DISCIPLINARY APPEALS

CAUSE NO. 05304

JACK G. SWISHER, JR.	§	BEFORE THE BOARD
v.	§	OF
COMMISSION FOR LAWYER DISCIPLINE APPEALS	§ §	DISCIPLINARY

ORDER SETTING HEARING

This matter is hereby set for submission by televideo conference between Austin and Houston at 9:00 a.m., Friday, July 28, 1995, in the conference room of the State of Texas Department of Information Resources, 300 W. 15th Street, Suite 1300, Austin, Texas 78701. One-half (1/2) hour will be allowed to complete the equipment linkup, so that oral argument can begin at 9:30 a.m. Each side will have twenty (20) minutes to argue, and appellant with (sic) have an additional ten (10) minutes to conclude.

SIGNED this 17th day of July, 1995.

STEVEN J. WATKINS, CHAIRMAN
BOARD OF DISCIPLINARY APPEALS

NO. _____

BEFORE THE

SUPREME COURT OF TEXAS

JACK G. SWISHER,

APPELLANT

V.

THE STATE BAR OF TEXAS,

APPELLEE

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR HEARING OF CASE IN CHIEF BY TELE-VIDEO CONFERENCING

LAW OFFICES OF JACK SWISHER

BY: _____
Jack Swisher
Attorney at Law, *pro se* for Appellant
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565
TBA #19589000

NO. _____

BEFORE THE

SUPREME COURT OF TEXAS

JACK G. SWISHER,

APPELLANT

V.

THE STATE BAR OF TEXAS,

APPELLEE

APPELLANT'S MOTION, NOTICE OF MOTION, AND ORDER FOR CONTINUANCE, FOR CONTINUANCE HEARING APPEARANCE BY TELEPHONE, AND FOR HEARING OF CASE IN CHIEF BY TELE-VIDEO CONFERENCING

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Jack Swisher, hereinafter called Appellant, filing Appellant's Motion, Notice of Motion, and Order for Continuance, for Continuance Hearing Appearance by Telephone, and for Hearing of Case in Chief by Tele-video Conferencing in the above styled cause and, as grounds therefor, would show as follows:

I.

Appellant has prosecuted this case to date with due diligence.

II.

This motion is not meant for delay only. The ends of justice would best be served by the Court's granting this motion for continuance.

Appellant will diligently prosecute this action on its merits, if permitted to do so by grant of this motion.

III.

Appellant, appearing *pro se*, is an American individual with physical disabilities that substantially limit one or more of his major life activities, and has throughout his adolescent and adult life been regarded as having such an impairment. He was and is one of a class of individuals protected by the provisions of Title 42, Sec 12101, et seq, Chap. 126, Americans with Disabilities Act, U.S.C. He requests that he be allowed to appear and represent himself before the Honorable Supreme Court by live video, though all other counsel, parties, witnesses, and exhibits would be present in the courtroom. Appellant submits a Houston, Texas video taped news report describing a jury trial he conducted on July 24-25, 1995 employing the proposed system. His appearance before the Texas Board of Disciplinary Appeals herein was conducted by video in the manner proposed.

IV.

Appellant respectfully further requests that he be allowed to appear by telephone at the continuance hearing, if necessary, to consider these matters.

V.

Prior to hearing of the matter in chief before the Honorable Supreme Court, appellant requests permission to demonstrate the equipment and methods reasonably necessary to permit the

proceedings to occur, with the least inconvenience to the Court, so that the viability of this proposal may be determined to the Court's satisfaction.

VI.

It is only recently that enabling ISDN communication line technology became available in Houston, Texas, where appellant resides, and that appellant became aware that the courts, as State agencies, are bound by the mandates of the Americans with Disabilities Act:

1. We recognize that -the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.- *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975). But under the Supremacy Clause, from which our pre-emption doctrine is derived, -any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.- *Felder v. Casey*, 487 U. S., at 138 (quoting *Free v. Bland*, 369 U. S. 663, 666 (1962)); see also *De Canas v. Bica*, 424 U. S. 351, 357 (1976) (-even state regulation designed to protect vital state interests must give way to paramount federal legislation-). *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. _____ (1992).

2. "As government entity, court system is required pursuant to Americans with Disabilities Act (ADA) to make all of its services, programs, and activities available to qualified individuals with disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 1993.

3. ADA Sections 12131 through 12134, 42 U.S.C. § 12131-12134, prohibit discrimination in public services... The ADA, 42 U.S.C. § 12101 et seq., provides: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. 42 U.S.C. § 12131(1) defines "public entity" to include any state or local government or any

department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. § 12131(1)(A) and (B). Congress enacted the ADA on July 26, 1990, and provided: (a) General Rule. Except as provided in subsection (b), this subtitle [42 U.S.C. § 12131-12133 and this note] shall become effective 18 months after the date of enactment of this Act [the ADA]. (b) Exception. Section 204 [42 U.S.C. § 12134] shall become effective on the date of enactment of this Act [the ADA]. Pub.L. No. 101-336, Title II, § 205, 104 Stat. 337 (1990). Hence, contrary to the defendants' assertion, the ADA became effective on January 26, 1992.

[5] The defendants cite Kent v. Director, Mo. Dept. of Elem. and Sec. Educ. and Div. of Vocational Rehabilitation, 792 F.Supp. 59, 61-62 (E.D.Mo.1992), as authority for the proposition that a plaintiff cannot bring suit under the ADA... The Kent court looked to the enforcement provision of 42 U.S.C. § 12117(a) in determining that the procedures of § 2000e-5 are applicable to an ADA proceeding. [FN2] 792 F.Supp. at 62. Because the plaintiff in Kent complained of employment discrimination, the court looked to the enforcement provision governing the title of the ADA that covers employment discrimination, 42 U.S.C. § 12117(a).

Kent does not apply to this cause. Mr. Noland's allegations involve an entirely different title of the ADA (Title II--Public Services) and are governed by an entirely different enforcement provision--42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

"...the requirements of the ADA are more than mere preferences; they are mandates enforceable by law. 42 U.S.C. § 12101 et seq. In determining whether a statute reflects a "congressional preference" or imposes "binding mandates", the Supreme Court has emphasized two factors. Wilder v. Virginia Hosp. Ass'n, 496 U.S. at 512, 110 S.Ct. at 2518; Suter v. Artist M., --- U.S. at ----, 112 S.Ct. at 1372 (Blackmun, J., dissenting). The first factor is whether the statute is "cast in mandatory rather than precatory terms." The second factor is whether any federal benefit is expressly conditioned upon compliance with the statute. Id. The ADA uses such mandatory language as "shall". See 42 U.S.C. § 12132 ("no qualified

individual with a disability shall ... be excluded from participation in or be denied the benefits").

For the reasons following, the court determines that qualified immunity is unavailable to the defendants as against the ADA claims.

[28] The defendants claim entitlement to qualified immunity, contending that the ADA was not clearly established law during the time in which the conduct that Mr. Noland alleges occurred. To the contrary, it is difficult to understand how the right asserted by Mr. Noland could have been more clearly established. The ADA and regulations regarding the ADA put the defendants on notice that their failure to even attempt to accommodate Mr. Noland was unlawful. The ADA was enacted July 26, 1990; the ADA provisions relevant to this action went into effect on January 26, 1992. Pub.L. No. 101-336, Title II, § 205, 104 Stat. 337 (1990). Unlike claims of constitutional violations, the ADA eventually was accompanied by a set of explanatory regulations, which were promulgated and effective as of July 26, 1991. 42 U.S.C. § 12134.

An official might claim qualified immunity when he has violated the ADA if his actions could reasonably have been thought consistent with an individual's rights under the ADA. See Anderson v. Creighton, 483 U.S. at 640, 107 S.Ct. at 3039. The defendants are presumed to know the law--in this case the ADA-- governing their actions. See Harlow v. Fitzgerald, 457 U.S. at 818-19, 102 S.Ct. at 2738. It is simply incomprehensible to believe that any of the defendants could have reasonably believed their inaction was consistent with Mr. Noland's rights under the ADA--an Act with the specific purpose of eliminating discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). The ADA is clear: no qualified disabled individual shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *Noland v. Wheatley*, 835 F.Supp. 476, N.D. Indiana, 1993.

4. The ADA provides that an individual is disabled if, inter alia, he or she has a physical or mental impairment that substantially limits one or more of his or her major life activities. 42 U.S.C.A. § 12102(2). Once such a disability has been established, the ADA generally requires the persons or entities designated by the Act to make reasonable accommodations or modifications for the disability. See, e.g., 42 U.S.C.A. §§ 12112, 12131(2),

12182(b)(2)(A)(ii), 12184(b)(2)(A). Title II of the ADA provides: Subject to the provisions of this [title], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C.A. § 12132.

[4][5] Admission to the Delaware bar is governed exclusively by this Court. In re Hudson, Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. The Board, as an instrumentality of this Court, constitutes a public entity within the meaning of Title II. See 42 U.S.C.A. § 12131(1); Supr.Ct.R. 51. Consequently, as a public entity, the Board must make reasonable accommodations to prevent the de facto exclusion "which may occur when disabled but otherwise qualified individuals are limited by standard administrative or other operating procedures from participating fully...

FN5. In D'Amico, the court pointed out that the ADA defines the term "person" as used in the examination and courses provision of Title III as having the same meaning given the term in Section 701 of the Civil Rights Act of 1964. Id. (citing 42 U.S.C. § 12111(7)). In the Civil Rights Act, "person" is defined as including governments and governmental agencies. Id. (citing 42 U.S.C. § 2000e(a)). *In re Petition of Rubenstein*, 637 A.2d 1131, Del. 1994

5. "Regulation promulgated pursuant to ADA, concerning examinations offered by private entities, applied to New York State Board of Law Examiners; although regulation referred to "private entity," Act defined "person" to include governments and government agencies.

In 1992, Congress passed the ADA to address the problem of discrimination against persons with disabilities. Specifically, the ADA prohibits discrimination

1. in employment (Title I),
2. in public services and public transportation (Title II),
3. in public accommodations (Title III), and
4. in telecommunications (Title IV).

Title II of the ADA, 42 U.S.C. § 12131 et seq., which is

the subject of this dispute, provides: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132." *Pazer v. New York State Bd. of Law Examiners*, S.D.N.Y.1994, 849 F.Supp. 284.

At issue is whether or not the day has arrived for severely disabled Texas attorneys and parties *pro se* to appear at, and to conduct, hearings on their cases before the Texas Supreme Court, employing todays more-than-adequate audio/video technologies, or continue to face the old transportation and communication barriers that the Americans with Disabilities Act was intended to remove.

VII.

In support of the request for live video appearance appellant testifies as follows:

1. "Both of my arms have been paralyzed since 1952, and two-thirds of my breathing strength, the latter requiring my use of iron lungs and other respirator equipment to sleep in at night for those 43 years, and I currently use a respirator most of the day to practice law. It requires the assistance of another person for me to appear, and the process operates as a severe transportation and communication barrier which can be simply removed by allowing appearance by audio/video communication. Employing such video methods and equipment from my home, I tried a case in Houston, Harris County, Texas to a jury verdict on July 24-25, 1995 to the satisfaction of the district court in Cause No. 94-028600, 234th Judicial District, Dyrika Bailey vs. American National Insurance Company. Another trial is pending for me to represent a client in a different Harris County district court which has approved the proposed method, in Cause No. 94-38385, 80th Judicial District, Harris County, Texas, Sally Reagan vs. Fidelity & Casualty Company of New York (*a method by telephone alone is allowed by the Texas Workers' Compensation Commission for my hearings before the Commission, in and out of Houston, and by Rule 202(2), Texas Rules of Civil Procedure, for taking oral depositions of witnesses)."

2. The Americans with Disabilities Act recites in pertinent part:

   The Congress finds that--

(3) discrimination against individuals with disabilities persists in such critical areas as transportation, communication, and access to public services;

(5) individuals with disabilities continually encounter various forms of discrimination, including the discriminatory effects of transportation, and communication barriers, failure to make modifications to existing practices, and relegation to lesser opportunities;

(6) people with disabilities, as a group, are severely disadvantaged vocationally, economically;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

VIII.

In order to support a showing of diligence in prosecuting this case, appellant will conclude the necessary audio/video

equipment and methods demonstration, and docket control requirements, in time to have the hearing of his case within the next 180 days, or as the Court deems fair, though he will be prejudiced by the conduct of such hearing without the requested audio/video equipment and methods.

PREMISES CONSIDERED, appellant requests that hearing of his case be postponed for another 180 days, or for some reasonable period of time determined by the Court, so that the Court may determine the efficacy of this request; that appellant be allowed to appear by telephone at the continuance hearing to consider these matters; and that appellant have all other entitled general and special relief, at law and in equity.

AFFIDAVIT

I, Jack Swisher, am the Appellant in the above captioned cause. I have read the above and foregoing, and swear that same is true and correct, to certify which my signature is below given on the date first hereinafter set out.

STATE OF TEXAS SIGNED:

_____

Affiant - Jack Swisher

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared the above affiant who, on oath, stated that the above and foregoing is true and correct, to certify which my hand and seal of office are below subscribed this May 28, 1996.

My Commission Expires:

_____

_____

Notary Public in and for
Harris County, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of these contents has been forwarded to Ms. Linda Acevedo, Assistant General Counsel, Office of the General Counsel, State Bar of Texas, 400 West 15th Street, First State Bank Building, Suite 1500, Austin, Texas 78701, 512/463-1463, fax 512/477-4607, by certified mail,

return receipt requested, and/or faxed or delivered, and in accordance with Rule 21a, Texas Rules of Civil Procedure, V.A.T.S., this May 28, 1996.

Respectfully submitted,

LAW OFFICES OF JACK SWISHER

BY: _____

Jack Swisher
Attorney at Law, *pro se* for Appellant
1445 North Loop West, #110
Houston, Texas 77008
713/961-0161; fax 713/802-6565
TBA #19589000

STATE BAR OF TEXAS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P994848594

July 19, 1993

Jack G. Swisher, Jr.
1445 N. Loop West, Suite 110
Houston, Texas 77008

Re:H0029302513 Johnny J. Fisk - Jack G. Swisher, Jr.

Dear Mr. Swisher:

After considering all of the evidence and testimony presented in the above referenced complaint, the Committee has concluded that you engaged in professional misconduct in violation of Disciplinary Rules.

Pursuant to the Texas rules of Disciplinary Procedure, if you wish to accept the offer enclosed, you must sign the Agreed Findings of Fact and Conclusions of Law and Agreed Judgment and return them to this office within twenty (20) days of the date of receipt of this notice.

If you do not wish to accept this offer, this office should be advised in writing of your decision not to accept within twenty (20) days of the date of receipt of this notice.

You are hereby advised that if the signed Agreed Judgment or your written rejection thereof are not received in this office within twenty (20) days of the date of receipt of this notice the Judgment will be deemed to have been rejected and the matter shall proceed pursuant to rule 2.13 of the Texas Rules of Disciplinary Procedure. The sanction of Private Reprimand is not available once the twenty day time frame referenced above has passed. You are further advised that you may be subject to court costs and additional attorneys fees if you do not sign this Judgment.

If you wish to discuss this Judgment or the language in the Findings of Fact, please contact me at the number listed below.

Sincerely,

Elaine Machuga Moore
Assistant General Counsel
Office of the General Counsel
State Bar of Texas

Enclosures

CF3-14.PRI

BEFORE THE GRIEVANCE COMMITTEE FOR THE STATE

BAR DISTRICT NO. 04J, THE STATE BAR OF TEXAS

Complaint Against	X	
Jack G. Swisher, Jr.	X	No. H0029302513
Houston, Texas	X	

AGREED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A complaint was docketed by the Grievance Committee for State Bar District No. 04J, State Bar of Texas, against Jack G Swisher, Jr, Texas Bar Number 19589000, (hereinafter called "Respondent") a licensed attorney and member of the State Bar of Texas, residing or maintaining an office in Houston, Texas, Harris County, by Johnny J. Fisk, as Complainant, alleging certain acts of professional misconduct on the part of the Respondent which occurred in Harris County, Texas. A Panel of the Committee has conducted a hearing on this complaint and having considered all of the evidence submitted, and by agreement of the Respondent lawyer, has on July 06, 1993 made the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.

Complainant retained Respondent in or around April 1988 to prosecute a civil claim. On December 27, 1991, Complainant's case was dismissed for lack of prosecution due to Respondent's failure to file a status report with the court. Although Complainant contacted Respondent subsequent to the dismissal, Respondent failed to inform Complainant that the case had been dismissed. Complainant learned of the dismissal by calling the court directly in or around January 1993.

II.

CONCLUSIONS OF LAW

It is agreed that the foregoing findings of fact support a violation of Rule(s) 1.01 (b)(1), for neglecting a legal matter entrusted to Respondent, and 1.03 (1), for failing to keep a client reasonably informed about the status of a matter, of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, State Bar Rules, effective January 1, 1990.

SIGNED this ____ day of _____, 19_____.

GRIEVANCE COMMITTEE
DISTRICT NO. 04J
STATE BAR OF TEXAS

BY: _____
Eva Guzman
Chairperson

CONSENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

In connection with the charges of professional misconduct filed against me and heard by your Committee, I hereby consent to entry of Agreed Findings of Fact and Conclusions of Law in the form submitted to me.

SIGNED this_____ day of _____, 19 _____.

_____
Jack G Swisher, Jr
State Bar No. 19589000

STATE OF TEXAS
COUNTY OF _____

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Jack G Swisher, Jr, known to me to be the person whose name is subscribed to the foregoing instrument, and being by me first duly sworn, acknowledged to me that he executed same for the purposes and considerations therein expressed, and the Agreed Findings of Fact and Conclusions of Law are true in every respect.

GIVEN UNDER my hand and seal of office this _____day of _____, 19 ____.

_____
Notary Public in and for the State of Texas

_____ _____
My commission expires Printed Name of Notary

CF6-1.PRI

BEFORE THE GRIEVANCE COMMITTEE FOR THE STATE BAR DISTRICT NO. 04J, THE STATE BAR OF TEXAS

Complaint Against	X	
Jack G. Swisher, Jr.	X	No. H0029302513
Houston, Texas	X	

JUDGMENT OF PUBLIC REPRIMAND

A complaint was docketed by the Grievance Committee for state Bar District No. 04J, State Bar of Texas, against Jack G Swisher, Jr, Texas Bar Number 19589000, (hereinafter called "Respondent") a licensed attorney and member of the State Bar of Texas, residing or maintaining an office in Houston, Texas, Harris County, Texas, by Johnny J. Fisk, as Complainant, alleging certain acts of professional misconduct on the part of the Respondent which occurred in Harris County, Texas.

The Grievance Committee and the Respondent lawyer have signed an Agreed Findings of Fact and Conclusions of Law on file herein, and said findings and conclusions support a Judgment of Public Reprimand herein agreed to, and by reason of said findings and conclusions the Committee is of the opinion that Respondent is guilty of professional misconduct and should be publicly reprimanded.

Respondent consents to the rendition and entry of this Judgment and having his/her acknowledgment tot he Agreed Findings of Fact and Conclusions of Law taken in accordance with the provision of the State Bar Rules.

This Public Reprimand is to be made a matter of record and appropriately recorded in accordance with the Texas Rules of Disciplinary Procedure.

SIGNED this _____ day of _____, 19_____.

GRIEVANCE COMMITTEE
DISTRICT NO. 04J
STATE BAR OF TEXAS

BY: _____
Eva Guzman
Chairperson

CONSENT TO GRIEVANCE COMMITTEE JUDGMENT

In connection with charges of professional misconduct filed against me and heard by your committee, I hereby consent to entry of Judgment in the form submitted to me pursuant to Article X, Section 14 of the State Bar Rules.

SINGED this _____ day of _____, 19_____.

_____
Jack G Swisher, Jr
19589000

STATE OF TEXAS
COUNTY OF _____

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Jack G Swisher, Jr, known to me to be the person whose name is subscribed to the foregoing instrument, and being by me first duly sworn, acknowledged to me that he executed same for the purposes and considerations therein expressed, and the Agreed Findings of Fact and Conclusions of Law are true in every respect.

GIVEN UNDER my hand and seal of office this _____ day of _____, 19_____.

_____
Notary Public in and for the State of Texas

_____ _____
My Commission Expires Printed Name of Notary

NO. 89-31385

JOHNNY JOHNSON FISK, JR.	)	IN THE DISTRICT COURT OF
VS.	)	HARRIS COUNTY, TEXAS
HARRIS COUNTY PSYCHIATRIC CENTER, ET AL	)	127TH JUDICIAL DISTRICT

DEPOSITION OF JOHNNY JOHNSON FISK, JR.

May 16, 1990

APPEARANCES:

FOR THE PLAINTIFF:

Mr. Kirk Lyons
Attorney at Law
2323 McCue, No. 2
Houston, Texas 77056

For

Offices of Jack Swisher
1800 West Loop South, Suite 910
Houston, Texas 77027
By: Mr. Jack Swisher (Not Present)

FOR THE DEFENDANT DAVID BROWN, M.D.:

John D. Ellis and Associates
1221 Lamar, Suite 620
Houston, Texas 77010
By:Mr. John D. Ellis, Jr.
Ms. Katherine Levy

The oral deposition of JOHNNY JOHNSON FISK, JR. was taken by Defendant before me, Amelia Boyd, Certified Shorthand Reporter in the State of Texas, in the law offices of Jack Swisher, 1800 West Loop South, Suite 910, Houston, Texas, beginning at approximately 10:00 a.m. on May 16, 1990, pursuant to Notice, Texas Rules of Civil Procedure and Stipulation of Counsel.

JOHNNY JOHNSON FISK, JR.,

having been first duly sworn under oath, did testify as follows:

PRELIMINARY PROCEEDINGS

THE COURT REPORTER: Please state your stipulations on the record.

MR. LYONS: Pursuant to the Rules. Mr. Fisk, you have the right to read this deposition and sign it. I usually have people waive the signature but if you want to read it and sign it, you have that right.

Do you want to do that or do you want to waive the signature?

THE WITNESS; Whatever you say.

MR. LYONS: We will waive the signature.

EXAMINATION

BY MS. KATHERINE LEVY:

Q Please state your full name for the record.

A Johnny Johnson Fisk, Jr.

Q Mr. Fisk, my name is Kathy Levy, and my firm, John Ellis and Associates, represents Dr. Brown

In The
Court of Appeals
For The
First District of Texas

No. 01-96-00036-CV

SALLY REAGAN, Appellant

v.

FIDELITY & CASUALTY COMPANY OF NEW YORK,
Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 94-38385

ORDER

The appellant has filed an unopposed "motion for oral argument appearance by tele-video conferencing" because the appellant's attorney does not have the use of his arms and uses a respirator to breathe. We GRANT the appellant's motion to appear at argument by live video appearance. The appellant shall be responsible for making all necessary preparations for a timely live video appearance at oral argument, but this Court will accommodate reasonable requests to facilitate the live video appearance.

Other relief is denied.

It is so ORDERED.

PER CURIAM

Panel consists of Justices Cohen, O'Connor, and Wilson.
Do not publish. Tex. R. App. P. 90.
Order entered
True Copy Attest: MAY 10 1996

Margie Thompson
Clerk of Court

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205
HERB SCHAEFER, CLERK

April 15, 1966

Jack Swisher
1445 North Loop West, #110
Houston, TX 77008

C. Mark Stratton
HIRSCH, ROBINSON, SHEINESS & GLOVER, p.c.
3600 One Houston Center
1221 McKinney
Houston, TX 77010

RE: Court of Appeals Number: 04-95-00123-CV
Trial Court Case Number: 93-044787

Style: Johnny Briles, Appellant
v.
Chateau International, Etc., D/B/A/Bender Creek Apartments & Downey Savings and Loan, D/B/A/ Bender Creek Apartments, Appellees

Dear Counsel:

The above cause has been set for formal submission and oral agrument (IF PREVIOUSLY REQUESTED) before this Court on the 24th day of May, A.D. 1996, 1:30 o'clock, before a panel consisting of Justice Stone, Justice Duncan, and Justice Hill. It is anticipated that the oral arguments by Tele-Conferencing will be heard at the University of Houston in Houston, TX. The Court will be keep you informed as to any updates that may have. This case had been previously set for December 8, 1995.

Argument is limited to twenty minutes to each with 10 minutes rebuttal. Argument may be heard ONLY from either party who has timely requested argument. If you do not wish to present argument, you must notify this Court in writing within seven (7) days of receiving this notice.

Any reply briefs should be filed no later than 12:00 noon 7 days prior to oral argument.

Very truly yours,

HERB SCHAEFER, CLERK

DIANA T. GARCIA, DEPUTY CLERK

CONSTITUTIONAL & STATUTORY PROVISIONS

1. 8th Amendment to the United States Constitution provides in relevant part:

   "...nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. 14th Amendment to the United States Constitution provides in relevant part:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Title 42 U.S.C. § 12101 provides in relevant part:

   "Sec. 12101. Findings and purpose

   (a) Findings

   The Congress finds that--

   (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

   (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

   (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

   (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

   (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with

disabilities."

4. Title 42 U.S.C. § 12102 provides in relevant part:

"Sec. 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands."

5. Sec. 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written

description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

6. Sec. 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

7. Sec. 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. Sec. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

8. Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means--

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

9. Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

10. Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

11. Sec. 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing

facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

12. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.01. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A. State Bar Rules. Article X--Discipline And Suspension Of Memberssection 9. Texas Disciplinary Rules Of Professional Conductv. Law Firms And Associations.

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the

consequences of the other lawyer's violation. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 5.03.

13. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A. State Bar Rules. Article X--Discipiine And Suspension Of Memberssection 9. Texas Disciplinary Rules Of Professional Conductv. Law Firms And Associations.

Rule 5.03. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

14. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9, Rule 1.01. Rule 1.01. Competent and Diligent Representation

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer;

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

15. V.T.C.A., Govt. Code T. 2, Subt. G App. A, Art. 10, Sec. 9,

Rule 1.03. Rule 1.03. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

16. a. V.T.C.A., Govt. Code T. 2, Subt. G App. A-1, Disc. Proc., 2.16. Vernon's Texas Statutes And Codes Annotated. Government Code. Title 2. Judicial Branch. Subtitle G. Attorneys. Title 2, Subtitle G--Appendix. A-1. Rules Of Disciplinary Procedure. Part II. The District Grievance Committees.

Sec. 2.16. Evidentiary Hearings

If the investigatory panel of the Committee finds Just Cause and if the Respondent fails to elect to have the Complaint tried in the district court, the matter may be transferred, if necessary, in accordance with the venue provisions of these rules. The chair of the Committee to which the matter is transferred shall appoint an evidentiary panel to conduct an evidentiary hearing, to make findings of fact and conclusions of law, and either to dismiss the Complaint or to impose Sanctions... Proceedings before an evidentiary panel of the Committee include:

A. Service upon the Respondent of a written statement of the specific charge or charges against the Respondent, together with a copy of the Complaint. The charge shall be formulated by the evidentiary panel on the basis of the findings of the investigatory panel...At the time of service upon the Respondent, the Chief Disciplinary Counsel shall also file with the Committee and serve upon the Respondent a proposed hearing order containing at least the following:

1. A list, including names, addresses, and telephone numbers of all witnesses expected to be called to testify before the panel in person or by deposition.

2. A written summary of the issues of fact expected to be contested.

I. The burden of proof is upon the Complainant and the Chief Disciplinary Counsel to prove the material allegations of the charge by a preponderance of the evidence.

M. Written findings of fact, conclusions of law, and any Sanctions shall be issued by the evidentiary panel within thirty days after the conclusion of the evidentiary hearing.

17. 28 U.S.C., Sec. 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Supreme Court, U.S.
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No. 96-076

In The
Supreme Court of the United States
October Term, 1995

JACK G. SWISHER
Petitioner,

vs.

THE STATE BAR OF TEXAS
Respondent.

On Petition for Writ of Mandamus
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel
Office of the General Counsel
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711-2487
512/463-1463

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STATEMENT OF THE CASE

A. Procedural History

This is a Texas attorney discipline matter arising from the professional misconduct of Petitioner, Jack G. Swisher ("Swisher"). On September 29, 1994, an Evidentiary Panel of the grievance committee for the State Bar of Texas, District 4I, entered a partially probated judgment of suspension from the practice of law against Swisher. Swisher appealed the judgment to the intermediary court of appeals, the Board of Disciplinary Appeals. The Board of Disciplinary Appeals affirmed the judgment on August 3, 1995, *without opinion.*

Swisher then appealed the judgment to the Texas Supreme Court which affirmed the judgment of suspension on April 12, 1996, *without opinion.* Swisher's motion for rehearing which raised new

claims was overruled by the Texas Supreme Court. Swisher attempted filing of a second motion for rehearing was rejected for filing by the Texas Supreme Court. The new claims raised in his motions for rehearing are in part the subject of his petition before this Court.

B. Statement of Facts

The Evidentiary Panel of the grievance committee, District 4I made the following findings of fact and conclusions of law:

> Jack Swisher is a licensed attorney and member of the State Bar of Texas, residing or maintaining an office in Houston, Harris County, Texas.
>
> On or about April, 1988, Johnny Fisk retained Swisher to prosecute a civil claim. Swisher failed to file a court ordered status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593. As a result of Swisher's failure to file the status report, Fisk's case was dismissed by the Court on December 27, 1991, for want of prosecution.

Although Swisher was contacted by Fisk subsequent to the December 27, 1991, dismissal, Swisher failed to inform Fisk of the dismissal. Instead, Fisk discovered that his case had been dismissed on January 20, 1993, when he contacted the 127th Judicial District Court directly to ascertain the status of his case. Swisher further failed to respond to and return Fisk's phone calls upon Fisk learning of the dismissal.

Swisher's continued practice of law pending any appeals of this partially probated suspension poses a substantial threat of irreparable harm to Swisher's clients or prospective clients. The General Counsel of the State Bar of Texas has incurred reasonable attorney's fees and direct expenses associated with the proceedings of this matter in the amount of $2,770.00 which should be paid by Respondent.

The Evidentiary Panel concluded that the findings of fact support the following violations of Texas Disciplinary Rules of Professional Conduct:

1.01(b)(1) [In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer]; and

1.03(a) [A lawyer shall keep a client reasonably informed about the status of a matter and promptly

comply with reasonable requests for information]. On the basis of these findings, the Evidentiary Panel entered a one (1) year suspension against Swisher, with the last seven (7) months probated.

OBJECTION TO JURISDICTION

Petitioner, Swisher, asserts jurisdiction pursuant to 28 U.S.C. §1257 and Rule 10.1(c) of the Supreme Court Rules. However, the Texas Supreme Court did not decide any question of federal law. In fact, it issued no opinion in connection with its affirmance of Swisher's judgment of suspension. Supreme Court Rule 10 (c). Furthermore, Swisher's argument regarding the validity of the disciplinary rules as violative of the American with Disabilities Act ("ADA") was not raised in the Texas Supreme Court until after the affirmance.

Finally, while couched in terms of constitutional deprivations, a review of the majority of Swisher's "Questions Presented" reveals nothing more than a dissatisfaction with the outcome of his disciplinary proceeding and the ensuing judgment of suspension. This petition is simply an attempt by Swisher to relitigate his disciplinary case.

On this basis alone, the petition should be overruled.

ARGUMENT

A. This Court lacks jurisdiction to consider the complaints raised in "Questions Presented" Nos. 4-10 because they involve an attempt by Swisher to relitigate his disciplinary case before this Court.

Although Swisher's arguments are couched in terms of constitutional deprivations, what Swisher truly seeks is another forum in which to relitigate the disciplinary proceeding which led to his suspension

from the practice of law. His petition is fraught with a rehash of his arguments made in the Texas courts including pleading defects, standard of proof, sufficiency of the evidence, interpretation of the disciplinary rules, retaliation by the grievance committee, the discipline assessed, and what he perceives to be the basis for the appellate courts decisions. (See "Questions Presented Nos. 4-10). These matters do not involve federal questions but rather reflect Swisher's desire to retry his case before this Court. This Court cannot reconsider these issues and the petition should be overruled.

B. Remaining Issues.

The only issues which could marginally be considered to involve the jurisdiction of this Court are those regarding the ADA, the Eighth Amendment, and the constitutionality of the specific

disciplinary rules. However, once again, given that the Texas Supreme Court issued no opinion in connection with its affirmance of Swisher's judgment of suspension, the Court did not render a decision involving a federal question or the validity of a state statute with federal constitutional implications.

However, these issues will each be addressed.

1. The Americans with Disabilities Act.

The American with Disabilities Act ("ADA") is inapplicable to lawyer discipline proceedings in this context. Swisher can point to no specific provision of the ADA which supports his position that the Act is violated by the assessment of discipline against a disabled lawyer who has committed professional misconduct.

The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities

in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. Title 42 U.S.C.A. §12101. None of these areas encompasses the conduct of the State Bar of Texas in carrying out its statutory duties and performing its regulatory functions with respect to lawyer discipline.

In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures; the hiring, advancement, or

discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment. Title 42 U.S.C.A. §12112. The State Bar of Texas does not fit in the definition of a "covered entity" in its relationship to Swisher. And while the vast majority of Swisher's practice may be in the area of worker's compensation, this fact does not transform Swisher into an employee of the State.

In the public services section, the ADA provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a "public entity" (defined as (A) any state or local government; and (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government). Title 42 U.S.C.A. §12132. Swisher cannot argue that he

was denied the opportunity to defend himself against the allegations of misconduct in violation of the ADA. The Evidentiary Panel allowed Swisher to appear and defend himself via telephone at his request. Thus, the State Bar did not deny Swisher access to the process.

Rather, Swisher argues that the discipline imposed has a greater impact upon him as a disabled lawyer then upon a non-disabled lawyer. Swisher's argument is unrelated to the provisions of the ADA. Any lawyer subject to a suspension faces similar economic consequences as a result of his or her misconduct. Swisher's true complaint is that he was treated the same as any other lawyer who has committed professional misconduct and that his disabilities were not considered as mitigation in assessing discipline.

And yet Swisher offered no evidence of his disabilities at the hearing in consideration of mitigation. Arguing that the State Bar was on notice of his disabilities because of the payment of college tuition by the State, issuance of a handicapped drivers license, or the refund of taxes on the purchase of his car is nonsensical. And the fact that Swisher had previously appeared before the Grievance Committee "on some dozen prior occasions over the years, 4 or 5 of those video recorded" does not relieve him of the responsibility of putting forth evidence on his own behalf.

The cases cited by Swisher are inapposite. They either involve the giving of examination by law examiners, jury selection process, bar admissions, or employment situations.

Swisher's arguments the disciplinary rules themselves violated the ADA are matters that were not even considered by the Texas Supreme Court as this complaint was raised after the Court affirmed the judgment. Equally without merit is Swisher's contention that the Texas Supreme court's action of declining to hear oral argument violated the ADA. The decision of whether to grant oral argument in any case is purely discretionary.

2. The Eighth Amendment is inapplicable to disciplinary proceedings.

Swisher argues that the assessment of discipline amounts to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. This argument is without merit. The only application of the Eighth Amendment in a civil proceeding involved in rem civil forfeiture

proceedings (civil forfeiture of property involved in drug offenses) and in that instance the application of the Eight Amendment was limited to the excessive fine portion of the amendment. *Austin v. United States*, 113 S.Ct. 2801 (1993).

Moreover, disciplinary proceedings are not penal in nature, are not taken for the purpose of punishing the attorney, and are remedial in nature. *In Re Ament*, 890 S.W.2d 39 (Tex. 1994). See also *McInnis v. State*, 618 S.W.2d 389 (Tex. App. -- Beaumont 1981, writ ref'd n.r.e.) cert. den. 456 U.S. 976; *Bryant v. State*, 457 S.W.2d 72, 78-79 (Tex. Civ. App. – Eastland 1970, writ ref'd n.r.e.); *Ex Parte Wall*, 107 U.S. 265 (1883). The laws governing disciplinary action were designed to protect the public by eliminating from the legal profession those attorneys morally unfit to enjoy its

privileges. *Galindo v. State*, 535 S.W.2d 923, 925 (Tex. Civ. App. -- Corpus Christi 1976, no writ).

3. Rules 1.01(b)(1) and 1.03(a) are constitutional.

Swisher argues that Rules 1.01(b)(1) and 1.03(a) are unconstitutional for vagueness and overbreadth. First, Swisher did not raise this complaint either at the hearing before the Evidentiary Panel or before the Board of Disciplinary Appeals. Thus, he was precluded from raising this constitutional issue at the Texas Supreme Court. *Wood v. Wood*, 159 Tex.350, 320 S.W.2d 807, 813 (Tex. 1959); *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798, 799 (Tex. 1956).

In addition, Swisher's argument once again rests on his erroneous contention that the disciplinary proceedings are quasi-criminal in nature. *See State*

Bar of Texas v. Evans, 774 S.W.2d 656, 657 (Tex. 1989); *Polk v. State Bar of Texas* 480 F.2d 998, 1002 (5th Cir 1973). The cases cited by Swisher all involve criminal proceedings and thus are inapplicable to the case at hand.

Finally, a statute is fatally vague when persons regulated by it are exposed to some risk or detriment without fair warning of the nature of the proscribed conduct. *State Bar of Texas v. Tinning*, 875 S.W.2d 403, 408 (Tex. App. -- Corpus Christi 1994) (citing *Texas Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970)). Due process is violated only when a required course of conduct is stated in terms so vague that persons of common intelligence must guess at what is required or when there is a substantial risk of miscalculation by those whose acts are subjected to regulation. *Id.* at 408.

Statutes are not unconstitutionally vague simply because some difficulty is found in determining whether marginal offenses fall within their language. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). In *Tinning*, *supra*, the court, in defeating a challenge to the constitutionality of former DR 3-102, stated:

> First, the factors listed in *Village of Hoffman Estates* militate in favor of a less stringent vagueness test. The rule is civil, not penal, in nature, and it regulates a profession whose members can be expected to consult applicable regulations and the writings of bodies empowered to interpret those regulations. Indeed, precisely by acquiring such expertise, lawyers hold themselves out as persons qualified to address the general public's legal needs, and the State justifies prohibiting unqualified persons from practicing law on the rationale that lay persons are not adequately trained to research the law or to provide the requisite level of service. A lawyer can inquire of other lawyers or ask the State Bar general counsel's office for help in interpreting the disciplinary rules.

Id. at 409.

The statutes in question here are constitutional.

CONCLUSION

Having failed to succeed on the merits in the Texas courts, Swisher continues in his attempt to couch this disciplinary proceeding as one involving the American with Disabilities Act ("ADA") plus a myriad of constitutional issues. In doing so, Swisher hopes to cloak this matter with significance beyond its merit. The ADA has no application to the context of this disciplinary proceeding nor are the Eighth or Fourteenth Amendments of the United States Constitution or Swisher's civil rights at issue.

This matter involves Swisher's neglect of his client's, Mr. Johnny Fisk, case. Swisher was at all times the attorney of record for Mr. Fisk. Swisher performed little work on behalf of Mr. Fisk and was responsible for Mr. Fisk's case being dismissed for

want of prosecution. And Swisher failed to inform Mr. Fisk that his case had been dismissed for want of prosecution. For this conduct, Swisher was properly disciplined.

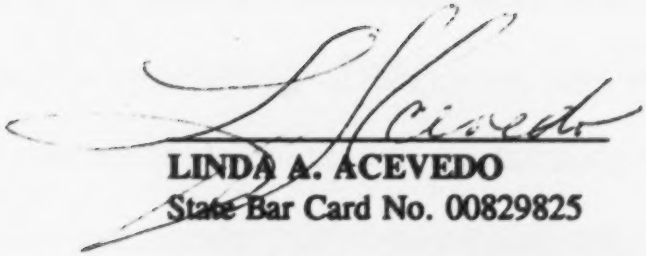
PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel

Office of the General Counsel
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711-2487
512/463-1463
512/477-4607 (FAX)



LINDA A. ACEVEDO
State Bar Card No. 00829825

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Jack G. Swisher, 1445 North Loop West, Suite 110, Houston, Texas 77008, by delivery of true and correct copies to them by certified mail, return receipt requested, by depositing the same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 14th day of August, 1996.

Linda A. Acevedo